Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

THE LUMMI NATION, *et al.*,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Counsel for Petitioner
The Tulalip Tribes

(Additional Counsel listed on signature page)

196948

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In 1975, a group calling itself the Samish Tribe sought a determination that it was entitled to treaty fishing rights under certain Indian treaties with the United States. After full hearings before a Special Master and the District Court, the request was denied. The Ninth Circuit Court of Appeals affirmed after "careful scrutiny". Subsequently, the Samish sought recognition as an Indian tribe in administrative hearings and litigation. Petitioner Tribes were adverse to that process assuming that Samish recognition would be used by Samish in an attempt to impair petitioners' treaty rights. However, at least one Petitioner herein was denied participation in those proceedings on the grounds that the proceedings would *not* affect any claims to treaty rights. After finally receiving federal recognition, the Samish Tribe sought to reopen the final treaty rights judgment against them. The request was denied by the district court. The circuit court reversed holding that a change in Samish legal status (i.e. recognition) was sufficient to allow reopening the final treaty rights judgment under Rule 60(b).

1. Whether a change in the law constitutes "extraordinary circumstances" to allow reopening a 25-year-old final judgment pursuant to Fed. R. Civ. P. 60(b)(6)?

2. Whether relief is available under Fed. R. Civ. P. 60(b)(6) for the alleged misconduct of a party in a separate proceeding more than one year after the judgment in this case?

3. Whether barring Petitioners from participating in administrative proceedings and litigation on the grounds that those proceedings will not affect their treaty rights denies Petitioner's right to due process as a result of the Ninth Circuit decision below?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs and Plaintiff-Intervenors

The United States of America

Puyallup Tribe of Indians

Confederated Tribes and Bands of the Yakama Indian Nation

Quileute Tribe

Hoh Tribe

Quinault Indian Nation

Jamestown, Lower Elwha & Port Gamble Bands of S'Klallam Tribes

Sauk-Suiattle Tribe

Lummi Nation

Skokomish Indian Tribe

Makah Tribe

Stillaguamish Tribe

Muckleshoot Tribe

Swinomish Indian Tribal Community

Nisqually Tribe

Tulalip Tribes

Nooksack Tribe

Upper Skagit Tribe

Defendant

State of Washington

Applicant for Intervention

Samish Indian Tribe

RULE 29.6 STATEMENT

Petitioners are federally recognized Indian Tribes, have no parents, and there are no publicly held companies that hold any stock of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI

The Lummi Nation, Upper Skagit Indian Tribe, Tulalip Tribes, Swinomish Indian Tribal Community, Port Gamble S'Klallam and Jamestown S'Klallam Tribes and the Yakama Nation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing is unreported. The decision of the Court of Appeals on the merits is reported at *United States, et al. v. Washington*, 394 F.3d 1152 (9th Cir. 2005). The opinion of the District Court denying relief from the judgment denying Respondent Tribe's Treaty rights, pursuant to Federal Rule of Civil Procedure 60(b)(6), is unreported.

STATEMENT OF JURISDICTION

On June 14, 2005, the Court of Appeals for the Ninth Circuit denied the request for rehearing *en banc* and the petition for rehearing by the panel and issued its mandate. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case is the latest appeal in the complex 35 year-old Indian Treaty fishing litigation of *United States v. Washington*, 384 F.Supp. 312 (W.D. WA 1974), *aff'd*, 520 F.2d 676 (9th Cir 1975), *cert. den.*, 423 U.S. 1087 (1976), *substantially aff'd sub nom, Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). As in many continuing jurisdiction natural resource allocation cases, the federal courts have issued dozens of rulings upon which the parties and the public have relied and continue to rely for the management of the fishery resources of the Pacific Northwest: here, at least thirty-six (36) reported Ninth Circuit opinions, eleven (11) reported District Court decisions and countless unreported District Court rulings.[1] The Ninth Circuit has now thrown much of this settled law into question.

In 1974, the District Court initially confirmed that five 1850s-era Treaties secured to some fourteen Washington State Indian Tribes the opportunity to harvest half of the salmon returning to tribal usual and accustomed fishing places. Petitioners Lummi Nation, Upper Skagit Indian Tribe, and Yakama Nation were among these tribes. *Id.* When the District Court issued this decision, Petitioner Upper Skagit Indian Tribe and the Stillaguamish Tribe were not recognized by the United States as American Indian Tribes. Nonetheless, the Ninth Circuit ruled that these 'unrecognized' tribes still held valid treaty fishing rights. *United States v. Washington*, 520 F.2d at 692-3.

Many other tribes successfully moved to intervene and obtain recognition of their treaty rights, including Petitioners Swinomish Indian Tribal Community Port Gamble, Jamestown and Tulalip Tribes. Five additional

1. *See* Appendix E.

groups, including Respondent Samish Indian Nation[2] ('Samish'), sought treaty fishing rights, but were found not to have them. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. den.*, 454 U.S. 1143 (1982). Samish chose to seek to intervene in 1974. Samish submitted the best evidence it could find to the Special Master assigned to the case, but he ruled against them. The District Court heard the matter on an appeal from the Master's decision and received substantial additional evidence. It, too, ruled against the Samish. *Id.* The Ninth Circuit made an unusually close examination of the full record before the District Court. It ruled that the factual findings (1) that Samish was not a successor in interest to any Treaty signer and (2) that Samish had not maintained an organized tribal structure in a political sense, were not clearly erroneous and were therefore affirmed. *United States v. Washington,* 641 F.2d at 1374. The Ninth Circuit reiterated its prior holding that federal recognition was not necessary, or even sufficient, to confirm treaty rights: ". . . we indicated that treaty – tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure. 520 F.2d at 693, 641 F.2d at 1371." After this ruling, Samish sought federal recognition as a tribe through the Bureau of Indian Affairs tribal acknowledgement[3] process, to gain the federal benefits that follow acknowledgement[4] and as a way around the 1979 holding that it was not a treaty tribe. By using this administrative procedure, Samish was able to exclude Petitioners from participating and challenging Samish assertions of Treaty rights. After an adverse decision

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2. Then known as the Samish Indian Tribe.

3. Federal acknowledgement and federal recognition are the same.

4. Federal recognition brings its own rewards, including health and education benefits as well as participation in gaming operations.

from the Bureau of Indian Affairs, Samish appealed, alleging (1) that the Bureau of Indian Affairs had mishandled Samish' petition for recognition, and (2) that Samish was entitled to treaty fishing rights. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989).

Petitioner Tulalip Tribe sought to intervene in *Greene*. Samish vigorously opposed Tulalip intervention, and the District Court denied Tulalip's motion to intervene. Stating that "the calculus for tribal treaty rights under the Ninth Circuit law is separate and distinct from that for federal acknowledgment," the District Court rejected Tulalip's concern that Samish would attempt to use *Greene* as the first step to overturning the District Court's Samish treaty status rulings. Tulalip then filed an interlocutory appeal on the intervention issue, which the Ninth Circuit denied on the ground that the issues of tribal recognition and treaty tribe status were fundamentally different. *Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993). (Petitioner Swinomish Indian Tribal Community also unsuccessfully attempted to intervene in the administrative process.) 61 Fed. Reg. 15,826 (1996).

On remand to the District Court, Samish sought to relitigate the issue as to whether or not it was the successor in interest to the aboriginal Samish Tribe that signed the Treaty of Point Elliot and thus entitled to treaty fishing rights. After reviewing the 1979 treaty status decision in depth, the District Court in 1991 and 1992 held that Samish was barred under the doctrine of *res judicata* from relitigating that status, and that "plaintiffs, therefore, have no rights under the Treaty of Point Elliot."[5] The Court also found that the "[Samish]

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5. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989), Order Granting Federal Defendants' Motion for Partial Summary Judgment at 10-13.

had a full and fair opportunity to litigate the issue of tribal succession," and that "[Samish] cannot escape the results entered therein by recasting its claims here."[6] The District Court subsequently reaffirmed its ruling[7]: the issue of treaty status had been resolved in *United States v. Washington*, it was binding in this case, and "treaty issues cannot be relitigated."[8] That conclusion was subsequently upheld by the Ninth Circuit in *Greene v. United States*, 996 F.2d 973, 975 (9th Cir. 1993). After additional administrative proceedings and yet another appeal to the District Court, the Samish were recognized in 1996. Five years later Samish sought relief from the 1979 treaty status judgment under Federal Rule of Civil Procedure 60(b). Samish asserted that the act of federal acknowledgment, coupled with the misconduct of the United States in its recognition battle, was grounds for relief pursuant to Fed. R. Civ. 60(b)(6). (Misconduct was not alleged as to any of the Petitioners.)

At no time from 1979 until the present has Samish alleged it was hindered in any way from presenting its case in the treaty status proceedings. Nor has Samish claimed that those proceedings were in any way unfair.

The District Court denied Samish's motion to re-open the judgment, holding that recognition did not constitute "extraordinary circumstances" justifying relief under Rule 60(b)(6) and that finality concerns outweighed Samish's interest in reopening the judgment given the complexity of the treaty fishing rights case. The Ninth Circuit reversed, finding that the need for finality was outweighed by the

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6. *Id.* at 15-16.

7. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989), Order dated February 25, 1992 at 5,7.

8. *Id.* at 7.

"extraordinary circumstance" of federal recognition coupled with the misconduct of the United States in its handling of Samish's quest for recognition.

By granting relief based on misconduct that occurred many years ago in a separate proceeding, the Ninth Circuit creates a conflict with rulings of sister circuits and potentially unsettles the thirty-one years of decisions in *United States v. Washington*[9] which have shaped fisheries management in Washington, Oregon and Alaska and under the Pacific Salmon Treaty with Canada. The Ninth Circuit also effectively denied Petitioners due process of law by holding that an administrative decision in a proceeding in which Petitioners were denied a voice may be a basis for reopening the 1979 decision on Samish's treaty tribe status. The Ninth Circuit decision has the immediate effect of destroying the parties' expectation of finality in the many prior rulings in this case. For example, Counsel for the Samish has ***already*** argued to the District Court that certain final rulings on "political successorship," made in 1974 and 1994, are no longer binding due to the Ninth Circuit decision on review here:

> The Ninth Circuit expressly ruled that the Lummi Nation and Swinomish Indian Community are not the political successors to the Samish Tribe. The Ninth Circuit then overruled any inconsistent rulings made on this subject by Judge Boldt in *Washington I*. . . . The Samish Indian Nation cannot be bound by any previous determinations of the Court in *U.S. v. Washington* regarding successorship to the Samish Tribe. . . .
>
> A similar issue exists regarding successorship to the Noowhaha Tribe. . . . In *United States v.*

9. The original District Court decision issued in 1974.

> *Washington*, 873 F. Supp. 1422, 1449 (W.D. Wash. 1994), the Court concluded that the Upper Skagit Tribe is the successor to the Noowhaha Tribe. . . . For present purposes, Samish entry into *U.S. v. Washington* cannot be condition on acceptance by the Samish Tribe of the 1994 Upper Skagit decision. This issue must be maintained as an active issue for future resolution.

Brief of Samish Indian Nation in Support of Samish Nation's Rule 60(b)(6) Motion on remand in W.D. Wash. Cause #Civ. 70-9213 (Subproceeding 01-2), filed 8/12/2005, at pages23-26. Samish has also asked the District Court to allow it to relitigate ***any*** issue if another Tribe takes a position on the issue adverse to Samish:

> While the Samish Tribe does not intend to raise or reopen previously decided issues as a general matter, the general rule should not as a matter of equity and justice apply when another party contests the Samish Tribe.

Id. at 23. The District Court, intimately familiar with the complexities of the *United States v. Washington* litigation, predicted the disruption that relitigation of previously decided issues would cause:

> The parties have worked diligently and extensively over the many years this case has been active to establish management frameworks that accommodate the fiercely competing needs of the various tribes and of the State. The issues have been complicated by the increasing scarcity of fish stocks and the need to preserve and conserve certain fish species. This case over a 28-year period has proven to be a battleground where

> many of these issues have been fought and solutions hammered out. The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this state, their addition would wreak havoc on hard-wrought management agreements and plans.

United States v. Washington, W.D. Wash. Cause # Civ. 70-9213, Order Denying the Samish Tribe's Motion to ReOpen Judgment, December 10, 2002, at page 17.

In addition to posing potential disruption to the complex litigation involved here, the Ninth Circuit decision vastly expands the grounds for re-opening a judgment under Rule 60(b)(6), and denies the Petitioner Tribes due process of law.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Ruling Denies Petitioners Due Process of Law.

After losing its bid for treaty tribe status in the courts, Samish continued to press for administrative recognition as a tribe through the federal acknowledgment process, 25 C.F.R. pt. 83. Petitioners Tulalip and Swinomish each tried to intervene in the administrative proceeding to protect their treaty fishing rights, but were refused. After the Bureau of Indian Affairs rejected Samish's recognition claim, Samish brought suit in district court alleging that the BIA had mishandled its petition for recognition and that it was entitled to treaty fishing rights. *Greene v. Lujan*, No. C89-645Z (W.D. Wash. 1989). The Tulalip Tribes again sought to intervene based on the contention that recognition could lead to dilution of Tulalip and other tribal treaty fishing allocations. The District Court rejected this contention. Minute Order (Oct. 16, 1989), *Greene*, No. C89-645Z.

Tulalip renewed its motion to intervene, arguing that Tulalip treaty fishing rights were threatened by the Samish attempt to obtain federal recognition. The District Court ultimately held that the issue of treaty status had been resolved in *United States v. Washington*, and that "treaty issues cannot be relitigated." Order of Feb. 25, 1992, at 7, 11, 16-26, *Greene*, No. C89-645Z.

Tulalip filed an interlocutory appeal of the denial of its intervention request. The Ninth Circuit affirmed because the issues of tribal recognition and treaty tribe status were fundamentally different. *Greene*, 996 F.2d at 976-78. The Circuit acknowledged that Tulalip would have a right to intervene *if* recognition would have an impact on Samish's treaty tribe status, *but expressly held that there would be no such impact*:

> We recognize that the two inquiries [*e.g.*, recognition and treaty status] are similar. Yet each determination serves a different purpose and has an independent legal effect. . . . *Federal recognition does not self-execute treaty rights claims. . . . As we just said, the Samish may not gain fishing rights from federal recognition alone.*

Id. at 977 (emphasis added).

In the case at bar, however, the Ninth Circuit did an "about-face," and held that federal recognition allows reconsideration of a treaty status decision. As the dissenting opinion below eloquently pointed out, that change of heart denied Tulalip and Swinomish[10] due process of law:

> It would have been an empty promise – indeed, a complete denial of due process – to deny the

10. Other Tribes may have foregone the opportunity to attempt intervention, in reliance upon the Court's rejection of the Tulalip and Swinomish motions to intervene.

> Tulalip Tribe's motion to intervene in the Samish BIA recognition proceedings on the basis that it could later protect its treaty rights in the *Washington I* and *II* courts, while all along assuming that by virtue of the Samish tribe gaining federal recognition, the *Washington I* and *II* courts would be required to grant the Samish tribe treaty rights. If that was the case, where then was the Tulalip Tribe to protect its interests? Elementary principles of due process . . . require that a tribe challenging the Samish Tribe's claims to treaty rights have an opportunity to disprove the maintenance of organized tribal structure and not be precluded from offering such proof by an administrative agency determination from which the challenging tribe was excluded.

United States, et al. v. Washington, 394 F.3d 1152 at 1168 (Bea, J. dissenting).

The dissent is correct. The Due Process Clause of Fifth Amendment to the United State's Constitution "requires that a party affected by government action be given 'the opportunity to be heard at a meaningful time in a meaningful manner.'" *California v. FERC,* 329 F.3d 700, 708 n.6 (9th Cir. 2003), *quoting Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Petitioners were denied that opportunity when their motions to intervene in the recognition proceedings were denied. If the Ninth Circuit decision is allowed to stand, then the Tulalip Tribe, the Swinomish Indian Tribal Community, and all the other Tribes which relied on the rulings in the *Greene* cases must now be permitted to seek relief from the judgment in the recognition proceeding and from the judgment in *Greene,* on the grounds that these judgments are void because they were issued in violation of Petitioners' constitutional right to due process of law. Re-opening the

Samish recognition proceeding would in turn upset the basis for the Ninth Circuit's ruling below, requiring reversal here. Either way, the Ninth Circuit's decision cannot stand.

B. The Ninth Circuit's decision in this case creates a substantial conflict among the Circuits on two issues.

1. Whether a change in the law constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6).

Every other federal court of appeals that has addressed the issue, other than the Ninth Circuit in the case below, has held that a change in the law does not constitute "extraordinary circumstances" warranting re-opening under Fed. R. Civ. P. 60(b)(6):

> It appears to be the settled rule of law that a change in the judicial view of the applicable law, after a final judgment, is not the basis for vacating a judgment entered before the announcement of the change

Berryhill v. United States 199 F.2d 217 (6th Cir 1952) (citations omitted), *Accord: Ashland Oil, Inc. v. Delta Oil Products Corp.*, 806 F.2d 1031 (Fed. Cir. 1992); *Morris v. Horn*, 187 F.3d 333 (3rd Cir. 1999); *Kirby v. General Elec. Co.*, 210 F.R.D. 180 (W.D.N.C. 2000), *aff'd*, 20 Fed. Appx. 167 (4th Cir. 2001); *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002); *Lehman Co. v. Appleton Toy & Furniture Co.*, 148 F.2d 988 (7th Cir. 1945).

The Ninth Circuit, on the other hand, stands alone and opines for the first time in any circuit that a change in a rule of law (i.e. the rule that federal recognition is neither relevant to nor determinative of treaty tribe status) is an "extraordinary

circumstance" justifying reopening pursuant to Fed. R. Civ. P. 60(b)(6). This Court should grant certiorari and bring the law of the Ninth Circuit back into line with the law of its sister Circuits.

2. Whether post-judgment misconduct occurring many years ago in a separate proceeding is a basis for relief under Rule 60(b)(6).

The Ninth Circuit opinion also creates a split in the Circuits on the issue of whether post-judgment misconduct occurring many years ago in a separate proceeding is a basis for relief under Rule 60(b)(6). The Ninth Circuit granted reopening in this case under Rule 60(b)(6) in part on the basis of alleged misconduct by the United States many years ago, even though (1) "misconduct" is covered by Rule 60(b)(3) and is therefore limited to a period of one-year, and (2) the alleged "misconduct" occurred not in the treaty tribe status proceedings to be reopened, but in Samish's *separate* recognition proceeding. This ruling ignores well-settled precedent, creates a conflict among the Circuit Courts, vastly expands the scope of relief available under Rule 60(b), and eviscerates the time limit in Rule 60(b)(3).

a. By granting a Rule 60(b) motion based on federal misconduct that occurred many years ago, the Ninth Circuit created a conflict with rulings from its sister Circuits that subsection (6) of Rule 60(b) cannot be used to expand subsections (1) through (3).

Fed. R. Civ. P. 60(b)(3) permits reopener for misconduct of a party:

> On motion and upon such terms as are just, the court may relieve a party or his legal

> representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party . . . ***The motion shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken***. (Emphasis added.)

Since Samish could not meet the one-year time limit, the Ninth Circuit granted relief under 60(b)(6). That decision is in direct conflict with the multitude of cases from this Court and the Circuit Courts holding that 60(b)(6) cannot be used to expand subsections (1) through (3). *E.g. Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988) ("Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' ***provided that*** the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." (Emphasis added.); *Marquip, Inc. v. Fosber America, Inc.*, 198 F.3d 1363 (Fed. Cir. 1999); *Simon v. Navon*, 116 F.3d 1, 5 (1st Cir. 1997); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir.1989).

The Fourth Circuit explained the policy behind this rule:

> Respect for finality of judgments is deeply ingrained in our legal system. As Justice Story observed, "[i]t is for the public interest and policy to make an end to litigation. . . ." so that "suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields*, 18 F. Cas. 532, 539 (No. 10, 406) (C.C.D. Mass. 1841) (Story, J. sitting as Circuit Judge). *See also Southern Pacific RR Co. v. United States*, 168 U.S. 1, 49 (1897). Equally compelling circumstances may arise, however, in which parties are entitled to be

> relieved of an unjust judgment arrived at through mistake, ignorance, inadvertence or misconduct. . . .
>
> Federal Rule of Civil Procedure 60 provides the terms on which these two principles are balanced. Rule 60(b)(3) allows a court to relieve a party from final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A motion under 60(b)(3), however, must be made within one year after the judgment was entered. ***Thus, the Rule suggests that equitable considerations prevail in such cases for one year,*** *and that the interest in finality of judgments prevails thereafter.*
>
> We are in complete accord . . . that 60(b)(6) ("any other reason justifying relief") cannot be used to circumvent the one-year limitation for grounds specified previously in the rule. . . .

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 675 F.2d 1349, 1354-55 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983) (emphasis added). In addition, "the one year time limit applicable to the first three clauses of Rule 60(b) would be meaningless if relief was also available under the catchall provision." *Wesco Prods. Co. v. Alloy Automotive Co.*, 880 F.2d 981, 983 (7th Cir. 1989). *Accord Simon v. Navon*, 116 F.3d at 5.

The only time the federal courts allow a challenge based on "fraud or other misconduct" after the one-year time limit has expired is when the conduct is so egregious as to constitute a "fraud on the court." The Circuit Courts have

uniformly held that the concept of "fraud on the court" is to be construed narrowly:

> The federal courts that have struggled with the definition of "fraud on the court" in the context of Rule 60(b) have found such a definition elusive . . . but have generally agreed that the concept should be construed very narrowly. . . . ***The principle concern motivating narrow construction is that the otherwise nebulous concept of "fraud on the court" could easily overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule.*** . . . Not all fraud is "fraud on the court." . . . "[F]raud on the court" is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged. . . .

Great Coastal Express, Inc., 675 F.2d at 1356 (emphasis added) (holding that perjury and fabricated evidence did not constitute a fraud on the court).

The Ninth Circuit's ruling in this case stands this well-established law on its head, and creates a split in the circuits as to when relief is available under Rule 60(b) for "fraud and other misconduct." The United States' treatment of Samish in the context of recognition may have been regrettable, but it has been remedied[11] and certainly does not rise to the level of a fraud on the court. Relief was therefore

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11. Regardless of whether the Ninth Circuit decision is allowed to stand, Samish will still be entitled to all of the federal benefits that flow from federal recognition, such as health care and education benefits, as well as the economic stimulus provided by gaming.

not available under 60(b)(3) or (6), and the Ninth Circuit's decision to allow Samish to re-open is in direct conflict with established law from this Court and the Circuit Courts.

b. By reopening a judgment based on misconduct without requiring Samish to prove that the misconduct prevented Samish from fully and fairly presenting its case to the District Court in 1979, the Ninth Circuit created a conflict with rulings from its sister Circuits that such proof is necessary.

The Circuit Courts have uniformly held that in order to get relief under Rule 60(b) based on fraud or other misconduct of an adverse party, the moving party must prove by clear and convincing evidence that the conduct complained of ***"prevented the losing party from fully and fairly presenting the defense."*** *Harley v. Zoesch*, 413 F.3d 866, 870 (8th Cir. 2005) (emphasis added); *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir. 2005); *State Street Bank and Trust Co. v. Inversiones*, 374 F.3d 158, 176 (2nd Cir. 2004), *cert. denied* __ U.S. __ (February 22, 2005); *Cummings v. General Motors Corp.*, 365 F.3d 944, 955 (10th Cir. 2004); *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002); *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000), *cert. denied*, 531 U.S. 876 (2000).[12] Conduct that occurs ***after*** judgment is entered ***necessarily*** does not affect a party's earlier presentation of its case.[13]

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12. The same principle applies when a movant seeks to set aside a judgment for fraud on the court under Rule 60(b)(6). *E.g., State Street Bank*, 374 F.3d at 176; *Davenport Recycling Associates v. C.I.R.*, 220 F.3d 1255, 1262 (11th Cir. 2000).

13. Petitioners have found only one exception to this rule: Where a party *foregoes* presenting its case, in reliance on a settlement

(Cont'd)

The Ninth Circuit's decision in this case granted relief to Samish on the basis of post-judgment "misconduct" that ***could not***, and ***did not***, prevent Samish from fully and fairly presenting its case to District Court in 1979 and/or to the Ninth Circuit in 1981. The vast majority of the federal misconduct[14] took place after the treaty status of Samish was decided in 1979. Moreover, Samish was represented by highly competent counsel in the proceedings before the Special Master, the District Court, the Ninth Circuit and this Court in its Petition for Certiorari. Nothing the United States might have done hindered the Samish in the presentation of its treaty status case.[15]

By granting re-opening based on the United States' "misconduct" without requiring Samish to prove that the misconduct affected Samish's ability to fully and fairly present its case to the District Court, the Ninth Circuit effectively overruled its own existing precedent and created a conflict with all the other Circuit Courts who have held to the contrary.

(Cont'd)

agreement which is repudiated by the other party more than one year after judgment, 60(b)(6) may provide an avenue of relief. *See United States v. Sparks*, 685 F.2d 1128 (1982). *Sparks* may have been effectively overruled by this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, (1994) (district courts lack jurisdiction to enforce settlement agreements except where order dismissing the action, by agreement of the parties, incorporates terms of settlement agreement or otherwise expressly indicates that court intends to retain jurisdiction over settlement agreement).

14. No misconduct by the Petitioners is alleged, and none exists.

15. In fact, Samish presented the District Court with additional evidence that was not before the Special Master.

c. By re-opening a judgment based on misconduct that did not occur in the course of the proceeding to be re-opened, the Ninth Circuit has vastly expanded the scope of "misconduct" covered by Rule 60(b).

The Ninth Circuit's decision to expand the grounds for relief under Rule 60(b)(6) is made even worse by the fact that the alleged misconduct involved the United States' handling of Samish's federal recognition proceedings, not the United States' handling of the treaty tribe status judgment sought to be re-opened here. Recognition proceedings have "marginal influence at best" on treaty tribe status, because "the Samish may not gain fishing rights from federal recognition alone." *Greene v. United States,* 996 F.2d 973 at 937. In other words, not only has the Ninth Circuit allowed its concern for Samish to create a split in the circuits, it has done so by allowing Samish to prove misconduct in a ***another, separate*** proceeding. The Ninth Circuit's unwarranted expansion of Rule 60(b), as well as the conflict among the Circuit Courts created by the Ninth Circuit's ruling in this case, argue in favor of granting certiorari.

VIEWS OF THE SOLICITOR GENERAL

The Court may want to request the views of the United States Solicitor General on this Petition for Certiorari. The United States was aligned as a party with Petitioners, and may be adversely affected if Samish is allowed to relitigate issues previously decided in this case.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted on behalf of the Petitioning Tribes this 3rd day of October, 2005.

Respectfully submitted,

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Counsel for Petitioner
The Tulalip Tribes

DANIEL A. RAAS
RAAS JOHNSEN & STUEN, P.S.
1503 E Street, P.O. Box 5746
Bellingham, WA 98227-5746
(360) 647-0234

Counsel for Petitioner
Lummi Nation

ALIX FOSTER
P.O. Box 817
LaConner, WA 98257
(360) 466-7220

Counsel for Petitioner
Swinomish Indian
Tribal Community

TIM WEAVER
TIM WEAVER LAW OFFICE
P.O. Box 487
Yakima, WA 98907
(509) 575-1500

Counsel for Petitioners
Confederated Tribes and Bands of the
Yakama Nation

HAROLD CHESNIN
25944 Community Plaza
WaySedro Wooley, WA 98284
(360) 854-7000

Counsel for Petitioner
Upper Skagit Indian Tribe

LAUREN RASMUSSEN
GENDLER & MANN, LLP
1424 4th Ave, Suite 1015
Seattle, WA 98101
(206) 621-8868

Counsel for Petitioner
the Port Gamble and Jamestown
S'Klallam Indian Tribes

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 6, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-35145

D.C. No.
CV 70-9213 BJR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF WASHINGTON; SWINOMISH TRIBAL COMMUNITY; NISQUALLY INDIAN TRIBE; PORT GAMBLE S'KLALLAM TRIBE; LOWER ELWHA BAND OF KLALLAMS; JAMESTOWN S'KLALLAM TRIBE; SKOKOMISH INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE OF WASHINGTON STATE; UPPER SKAGIT INDIAN TRIBE; LUMMI NATION,

Defendants-Appellees.

SAMISH INDIAN TRIBE,

Applicant in Intervention-Appellant.

Appendix A

Appeal from the United States District Court for the Western District of Washington; Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted
May 3, 2004—Seattle, Washington

Filed Jan. 6, 2005

Before: A. Wallace Tashima, Richard A. Paez, and Carlos T. Bea, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

Appellant Samish Indian Tribe ("the Samish") sought by means of Federal Rule of Civil Procedure 60(b)(6) to reopen *United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash.1979) ("*Washington II*"), *aff'd* 641 F.2d 1368 (9th Cir.1981), a judgment that denied the Samish treaty fishing rights on the ground that the tribe had not maintained an organized tribal structure. The Samish argued that federal recognition[1] of their tribe in 1996 was an extraordinary circumstance that justified reexamining their treaty fishing rights. The district court denied the motion to reopen, holding that federal recognition is of limited relevance to the Samish's treaty fishing rights, that the 1979 judgment was not

1. "Federal recognition" is a process by which the United States government formally acknowledges a government-to-government relationship with a historic tribe. *See* 25 C.F.R. §§ 83.2, 83.12 (2003).

erroneous, and that reopening the judgment would be extremely disruptive. We reverse.

BACKGROUND

In 1855, federal representatives in the Territory of Washington induced a number of Indian tribes to relinquish much of their land in return for payments and the right to keep small parcels of land. *See generally Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 661- 62, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). The resulting treaties also preserved the tribes' right to fish "at usual and accustomed grounds." *See, e.g.,* Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, 928.

A century later, however, runs of fish had become scarce and Native Americans took only a small fraction of the fish harvest. In 1970, the United States brought an action against the State of Washington to force it to protect the tribes' shares of anadromous fish runs. The United States brought the action on its own behalf and as trustee for seven Indian tribes. Another seven tribes successfully intervened in the action. *United States v. Washington,* 384 F.Supp. 312, 327 & nn. 1-2 (W.D.Wash.1974), *aff'd,* 520 F.2d 676 (9th Cir.1975) ("*Washington I*"). The district court ruled that all 14 tribes had fishing rights under various treaties, including the Treaty of Point Elliott, *id.* at 359-82, and that treaty tribes had a right to 50 percent of the harvestable fish passing through their traditional off-reservation fishing grounds. *Id.* at 343.

After the issuance of the decision in *Washington I,* the Samish intervened to assert fishing rights under the Treaty

of Point Elliott. The district judge referred the matter to a magistrate judge, sitting as a special master. After a five-day hearing, the special master found that the Samish were not recognized as an Indian tribe by the United States government and "have not lived as a continuous separate, distinct and cohesive Indian cultural or political community." The special master therefore concluded that the Samish "at this time" were neither a treaty tribe nor a political successor to a treaty tribe and "presently" did not hold treaty fishing rights. The Samish appealed the special master's ruling to the district court, which held a de novo evidentiary hearing. The district court concluded that the Samish were not entitled to treaty fishing rights. *Washington II*, 476 F.Supp. at 1106.

In arriving at this conclusion, the district court adopted and relied on findings of fact proposed by the United States. Those findings concerned the Samish's lack of an organized tribal structure, and included the following:

- The Samish Tribe "exercises no attributes of sovereignty over its members or any territory."
- It is not recognized by the United States as a tribe.
- Neither its organization nor its membership has been recognized by the Congress or the Department of the Interior for Indian affairs purposes.
- The Secretary of the Interior has not prepared an official membership roll for the tribe.

Appendix A

- "There is no requirement of specific minimum blood quantum either as to Samish blood in particular or Indian blood in general."

- Many tribe members "are of only 1/16th degree Indian blood" and "[t]wo have only 1/32nd Samish blood."

- "The tribe does not prohibit dual membership and at least one member is an officer of the Lummi tribe."

- The Samish members "do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community."

Id. After making these findings about the Samish, the district court stated as a conclusion of law that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." *Id.* at 1111.[2] The district court therefore concluded that "at this time" the Samish was not a treaty tribe and "presently" did not hold treaty fishing rights. *Id.*

We affirmed the district court in a divided decision, noting that "[w]e have defined a single necessary and

2. This conclusion is surprising given that in *Washington I* the district court determined that the Stillaguamish Tribe and the Upper Skagit Tribe were treaty tribes, although neither was federally recognized at the time. *See* 384 F.Supp. at 378-79.

sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir.1981) ("*Washington III* "). In determining whether this condition exists, we examine the organizational structure of the tribe at the time of the treaty signing with allowances for inevitable adaptation and assimilation: "tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73. Although the district court had erred in concluding that a tribe must be federally recognized in order to exercise treaty fishing rights, we held that the district court's findings of fact were not clearly erroneous and they provided some support for the conclusion that the Samish had not maintained an organized tribal structure.[3] *Id.* at 1373-74.

Because the Samish's inability to exercise their treaty fishing rights hinged on their status as an unrecognized tribe, and because the United States, tribes that opposed the Samish's exercise of treaty fishing rights, and the district court all suggested that future federal recognition might

3. In dissent, Judge Canby argued that the district court's factual findings could not be so easily severed from its erroneous belief in the necessity of federal recognition. 641 F.2d at 1374-75 (Canby, J., dissenting). Indeed, many of the findings simply reflected the Samish's lack of federal recognition. *Id.* at 1375. Because the district court's findings were insufficient to answer the proper legal inquiry, whether the Samish had "maintained tribal structures reflecting the degree of organization that existed at the time of the treaties, with reasonable allowances for adaptation to changing conditions," *id.* at 1374, Judge Canby would have remanded the case for further findings of fact. *Id.* at 1375-76.

warrant reexamination of the Samish's treaty fishing rights,[4] the Samish continued their pursuit of federal recognition. The Samish had first sought federal recognition in 1972, three years after a Bureau of Indian Affairs ("BIA") employee removed the Samish from a list used to determine whether a tribe was federally recognized. *See Greene v. Babbitt*, 943 F.Supp. 1278, 1281, 1284 (W.D.Wash.1996).[5] The Department of the Interior took no action on the Samish's application until 1979, and in 1987 the BIA issued a final decision denying tribal recognition of the Samish. *See* Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe, 52 Fed.Reg. 3709 (Feb. 5, 1987).

The Samish then filed an action challenging the BIA's denial of federal recognition. The Tulalip Tribe sought to

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4. For example, the government argued that "should [the Samish] succeed in obtaining 'acknowledgment' of their current status as [an] 'Indian tribe[ ]' in the pending administrative proceedings, this might justify an application to re-open the present judgment against them." Brief for United States in Opposition to Petition for a Writ of Certiorari, *Duwamish Tribes v. Washington*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982) (No. 81-509). Likewise, rather than ruling that the Samish no longer held treaty fishing rights, the district court ruled that the Samish "presently" did not hold such rights. *Washington II*, 476 F.Supp. at 1111.

5. Until the Department of the Interior adopted acknowledgment regulations in 1978, *see* 25 C.F.R. §§ 83.1-83.13 (2003), the federal government decided on an ad hoc basis which groups of Indians would be recognized as tribes. *See* Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L.Rev. 491, 491 (2003).

intervene in that proceeding, arguing that federal recognition of the Samish would lead to a dilution of the Tulalip's fishing rights. The district court denied the Tulalip's intervention motion and, in an interlocutory appeal, we affirmed the denial. *Greene v. United States*, 996 F.2d 973, 975 (9th Cir.1993). We held that although the federal recognition and treaty fishing rights inquiries were similar, "each determination serves a different legal purpose and has an independent legal effect." *Id.* at 976. We noted that even if the Samish achieved federal recognition, the tribe would need to challenge the decision in *Washington II* before it could exercise fishing rights. *Id.* at 977.[6]

On the merits of the Samish's challenge to the denial of federal recognition, the district court vacated the BIA's decision and remanded the case for a formal adjudication under the Administrative Procedures Act. *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059, at *9 (W.D.Wash. Feb.25, 1992), *aff'd, Greene v. Babbitt*, 64 F.3d 1266 (9th Cir.1995). After an eight-day hearing, an Administrative Law Judge ("ALJ") found that the Samish met all of the criteria necessary for federal recognition. The BIA rejected some of the ALJ's findings and conclusions, but ruled in favor of Samish recognition. *See* Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe, 61 Fed.Reg. 15,825 (Apr. 9, 1996). The district

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6. In dissent, Judge Reinhardt argued that if the Samish qualified for federal recognition, they necessarily also qualified for treaty fishing rights. 996 F.2d at 981 (Reinhardt, J., dissenting). Judge Reinhardt also noted that, as a practical matter, federal recognition "will undoubtedly carry great weight in any judicial reconsideration of Samish entitlement to treaty fishing rights." *Id.* at 982.

court reinstated the deleted findings and conclusions, however, and affirmed the recognition decision. *Greene v. Babbitt*, 943 F.Supp. at 1288- 89. The district court also noted that the Samish's "long journey for recognition has been made more difficult by excessive delays and governmental misconduct." *Id.* at 1281.

On August 23, 2002, the Samish filed with the district court a Rule 60(b)(6) motion to be relieved of the judgment in *Washington II*. The United States and nine tribes whose treaty fishing rights were confirmed in *United States v. Washington* ("the Opposition Tribes") opposed the Samish's motion. The district court held that federal recognition was not an extraordinary circumstance, reasoning that "a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights." *United States v. Washington*, No. CV 70-09213, Subproceeding No. 01-2, slip op. at 13, 16 (W.D.Wash. Dec. 19, 2002). The district court also noted that the Samish had not alleged that the *Washington II* proceeding was fundamentally unfair or that the Samish had been prevented from adducing evidence in support of its claim. The interest in finality was an equally compelling factor that weighed against reopening, given "the unmistakable conclusion that, at this stage, their addition would wreak havoc on hard-wrought management agreements and plans." *Id.* at 17.

The Samish filed a motion for reconsideration of the district court's ruling. In the motion, the Samish included a proposal that addressed the possible disruptions that its intervention in *Washington I* might cause. The district court denied the motion, reaffirming its conclusion that federal

recognition is not an extraordinary circumstance and that the interest in finality remained an overriding concern. This appeal followed. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review the denial of a Rule 60(b) motion for an abuse of discretion. *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1108 (9th Cir.2003). Under the abuse of discretion standard, we must affirm the judgment below unless (1) we "have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors," (2) the district court applied the wrong law, or (3) the district court rested its decision on clearly erroneous findings of material fact. *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir.2001).

ANALYSIS

I. Did the District Court Abuse Its Discretion By Ruling that Federal Recognition of the Samish Was Not an Extraordinary Circumstance?

The Samish contend that the district court abused its discretion by ruling that federal recognition was not an extraordinary circumstance that warranted reopening the judgment in *Washington II*. The Samish argue that this abuse of discretion resulted from errors of law.

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may

relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." The Rule 60(b)(6) catchall provision applies only when the reason for granting relief is not covered by any of the other reasons set forth in Rule 60. *Cmty. Dental Servs. v. Tani,* 282 F.3d 1164, 1168 & n. 8 (9th Cir.2002). It "has been used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir.1993). Thus, a party seeking to reopen a case under Rule 60(b)(6) "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." *Cmty. Dental Servs.,* 282 F.3d at 1168.

The Samish argue that the district court misinterpreted our precedents in ruling that "a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights." It is well-settled that federal nonrecognition cannot divest a tribe of treaty rights. In *Washington I,* we held that "[n]onrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights." 520 F.2d at 692-93. In *Washington III,* we held that the district court's view that federal recognition is required "is clearly contrary to our prior holding and is foreclosed by well-settled precedent." 641 F.2d at 1371; *see also Greene v. United States,* 996 F.2d at 976 (noting that "[f]ederal recognition is

not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott").

Although we have previously held that federal recognition is not *necessary* for the exercise of treaty fishing rights by a signatory tribe, we have never held that federal recognition is not a *sufficient* condition for the exercise of those rights. Indeed, our precedent leads us to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights. We have "defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *Washington III*, 641 F.2d at 1372. "For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73.

The mandatory criteria for federal recognition include the following:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
>
> . . .
>
> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

25 C.F.R. § 83.7.[7] The Samish argue persuasively that because they met the mandatory criteria for federal recognition, they necessarily met the condition for the exercise of treaty rights. *See Greene v. United States*, 996 F.2d at 981 (Reinhardt, J., dissenting) (arguing that "[i]f the single *necessary and sufficient* criterion for treaty rights is also a *necessary* condition for federal recognition, then achieving the latter necessarily satisfies the single qualification for the former").

Indeed, we have never held that recognition of a tribe—as opposed to nonrecognition—is irrelevant to its exercise of treaty rights, despite some dicta to the contrary. *See Greene v. Babbitt*, 64 F.3d at 1270 (incorrectly asserting that in *Washington I* "we held that a tribe's recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights"). This is not surprising, given the traditional deference that the federal courts pay to the political branches in determining whether a group of Indians constitutes a tribe. *See United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865) (holding that"[i]f by [the executive and other political departments of the government] those Indians are recognized as a tribe, this court must do the same"); *Washington I*, 384 F.Supp. at 400 (concluding that "[t]he recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government"); William C. Canby, Jr., *American Indian Law in a Nutshell* 6 (4th ed. 2004) ("Once granted, . . . the

7. The regulations define "historical" as "dating from first sustained contact with non-Indians." 25 C.F.R. § 83.1.

recognition will bind the courts until it is removed by the Executive or Congress.").[8]

It would be a rare case indeed where a court would deny treaty rights to a signatory tribe on the ground that it lacks an organized tribal structure, where the Department of the Interior has recognized that same tribe as a "distinct community [that] has existed as a community from historical times until the present" and that it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7; *see also* Felix S. Cohen, *Handbook of Indian Law* 5 (1982 ed.) ("No congressional or executive determination of tribal status has been overturned by the courts. . . .").

The district court erred in concluding that, because nonrecognition cannot impact vested treaty rights,

8. Indeed, the United States argued in *Washington III* that "[w]hile recent cases have indicated that the federal government's failure to recognize a tribe is not dispositive, *positive* recognition by the United States is accorded great deference and may well be controlling." Brief for United States in Opposition to Petition for a Writ of Certiorari, *Duwamish, Samish, Snohomish, Snoqualmie & Steilacoom Indian Tribes v. Washington*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982) (No. 81- 509) (emphasis added). The United States also noted that "[w]here the Congress or executive branch has expressly recognized a group of Indians as a tribe, the courts have repeatedly deferred to this essentially political decision" and that "*where there has been no such recognition*, a district court may make a factual inquiry into 'whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.' " Brief for the Federal Appellees, *Washington III*, 641 F.2d 1368 (9th Cir.1981) (No. 79-4447, 79-4472) (emphasis added).

recognition is irrelevant. The Samish would almost certainly have won the right to exercise its treaty fishing rights had the tribe been federally recognized at the time of *Washington II*. And although we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights,[9] this is an inevitable conclusion.

Although federal recognition is for all practical purposes determinative of whether the tribe has maintained an organized tribal structure, the Opposition Tribes argue that the Samish's federal recognition is still not an extraordinary circumstance. That is, the relevance of the Samish's federal recognition is not the *fact* of the recognition itself, but rather the *factual findings* underlying that recognition, and whether the Samish had a full opportunity to present the facts supporting its treaty status to the district court in *Washington II*. That an ALJ arrived at different factual findings on better evidence is not a reason for granting a Rule 60(b)(6) motion. *See Alpine Land & Reservoir Co.*, 984 F.2d at 1049 (holding that Rule 60(b)(6) "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment").

The crucial issue here is whether the fact that the Samish had the opportunity to litigate the factual basis underlying

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9. In extreme circumstances, courts may be able to overturn the decision to recognize a tribe. *See Baker v. Carr*, 369 U.S. 186, 216-17, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (in dicta) ("Able to discern what is 'distinctly Indian,' the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." (citing *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913))).

the tribe's treaty status in *Washington II* means that the Samish were not "prevented . . . from proceeding with the prosecution or defense of the action in a proper fashion." *Cmty. Dental Servs.*, 282 F.3d at 1168. In light of the government's "excessive delays and . . . misconduct" in withholding of recognition from the Samish, a circumstance beyond their control; the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue; and the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings of fact in *Washington II*, we conclude that the Samish were effectively prevented from proving their tribal status "in a proper fashion."

For its part, the government argues that *Washington II* should not be reopened, because the judgment is not inconsistent with the federal recognition of the Samish. That is, the federally recognized Samish may have existed since historical times as a distinct group, enjoy a government-to-government relationship with the United States, and yet still not be the successor to the Samish Tribe that was a signatory to the Treaty of Point Elliott, because the Swinomish Indian Tribal Community and the Lummi Nation are the political successors to the treaty-time Samish.

The government's position is inconsistent with our precedent. In *Washington III*, we "defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." 641 F.2d at 1372. Yet the government in essence argues that this "single

necessary and sufficient condition" is necessary but not sufficient. It is undisputed that the Samish were a party to the Treaty of Point Elliott. *See*, e.g., *Washington II*, 476 F.Supp. at 1106. It is also clear that the Samish "has been continuously identified throughout history as Indian or aboriginal, has existed as a distinct community since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe." 61 Fed.Reg. 15825, 15826.[10] As the Samish are a signatory tribe and have proved the single necessary and sufficient condition for the exercise of treaty rights, the res judicata effect of *Washington II* is all that is keeping the Samish from pursuing its treaty rights.[11]

Moreover, no tribe can be the political successor to the Samish unless that tribe merged or consolidated with the

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10. One commentator has explained that by acknowledging a tribe, the Department of the Interior "is not 'granting' sovereign status or powers to the group, nor is it creating a tribe made up of its Indian descendants. . . . Rather, the Department is acknowledging that the sovereign has existed continuously since historic times, retaining its inherent powers." Coen, *Tribal Status Decision Making*, 37 New Eng. L.Rev. at 499.

11. *United States v. Oregon*, 29 F.3d 481 (9th Cir.1994), is not to the contrary. There, the issue was whether constituent tribes of the federally recognized Colville Confederacy had abandoned treaty rights by breaking away from the Yakima Nation and Nez Perce Tribe, the beneficiaries of treaty fishing rights in the Yakima Treaty and The Nez Perce Treaty. *Id.* at 486-87. In the Treaty of Point Elliott, by contrast, each individual party tribe was guaranteed fishing rights. *See* 12 Stat. at 928.

Samish. *See United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir.1990) (holding that "for a signatory tribe to obtain treaty tribe status from another signatory tribe, it must first show that the two tribes or cohesive bands thereof consolidated or merged and demonstrate also that together they maintain an organized tribal structure"). The district court in *Greene v. Babbitt* specifically reinstated a finding by the ALJ that the Samish and the Swinomish had not merged, 943 F.Supp. at 1288 & n. 13, and the fact that some members of the Swinomish and Lummi tribes have Samish ancestry does not make them political successors to the Samish. *See Oregon*, 29 F.3d at 484. To the extent that the district court in *Washington I* found that the Samish had merged or combined with the Lummi and the Swinomish,[12] this is clearly inconsistent with the federal recognition of the Samish. *See* 25 C.F.R. § 83.7(c) (identifying one of the mandatory criteria for recognition as the petitioner's maintenance of "political influence or authority over its members as an autonomous entity from historical times until the present").

We conclude that the district court misinterpreted our precedents, and thereby abused its discretion, in ruling that

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12. The district court found that"[t]he present Lummi Tribe also includes descendants of the Semiahmoo and Samish Indians of 1855." *Washington I*, 384 F.Supp. at 360. Without naming the Samish, the district court found that "[t]he intervenor Swinomish Indian Tribal Community is the presentday tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to certain tribes and bands and groups of Indians which were parties to the Treaty of Point Elliott. . . ." *United States v. Washington*, 459 F.Supp. 1020, 1039(W.D.Wash.1978).

the fact of federal recognition had no impact on whether the Samish may exercise treaty fishing rights. Federal recognition is determinative of the issue of tribal organization, the issue upon which the Samish were denied treaty fishing rights in *Washington II*. As the Samish's lack of recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*.

II. Do the District Court's Finality Concerns Independently Support Its Denial of the Samish's Rule 60(b)(6) Motion?

Although we conclude that federal recognition of the Samish constitutes an extraordinary circumstance for purposes of Rule 60(b)(6), we still must decide whether the district court's finality concerns independently justify its denial of the Samish's motion.

The Samish argue that the district court abused its discretion by failing to balance finality concerns against the interest in achieving justice. The district court stated that the motion raised two principal issues: (1) whether extraordinary circumstances justified reopening the judgment, and (2)"whether the interests in finality are paramount to other interests." Having concluded that the lack of extraordinary circumstances was an independent basis for denying relief, the district court did not balance finality concerns but rather stated that they were "[a]n equally compelling factor."

In discussing the interest in finality, the district court stated:

> The United States and the Opposition Tribes point out that, in reliance on *Washington II,* this court has approved many state-tribal fish management plans, mediated and decided intertribal disputes on treaty fishing issues, determined treaty tribes' usual and accustomed fishing places, and decided allocation issues. The United States and Opposition Tribes rightly observe that management of fish harvest involves a delicate balancing of interests within the overall framework and that these management plans—achieved after considerable time and expense—would be upset by the addition of another Tribe at this late stage.
>
> . . . The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this stage, their addition would wreak havoc on hard-wrought management agreements and plans.

(Citation omitted.) The district court also noted that the interest in finality is at its zenith in natural resource allocation cases.

In its motion for reconsideration, the Samish included a proposal to minimize possible disruptions that its participation in *Washington I* would entail. The Samish noted that three of the tribes participating in *Washington I* had

established themselves as successors in interest to Samish treaty rights, and the Samish "would agree to exercise treaty fishing rights under the orders in the case that apply to these three tribes, and under the regulatory authority and framework of the three tribes." Under this proposal, the Samish argued, their inclusion would not disrupt existing orders.

Despite "the Samish's efforts to craft a workable, minimally disruptive framework for the Tribe's intervention," the district court remained unconvinced: "Under any scenario, the Samish, in addition to the other newly recognized Tribes likely to seek intervention, would necessarily inject themselves into sensitive agreements and upset current treaty tribes' allocations." The district court then hedged its conclusion somewhat by pointing out that finality concerns "were not the sole or even the chief basis for denying the tribe's motion to reopen," and that "[t]o focus on mitigating the effects of reopening a judgment, rather than on whether reopening a judgment is procedurally allowable, is to put the cart before the horse." It also noted that "even putting aside the finality concerns . . . , there are ample reasons to deny the Tribe another chance at litigating its treaty status."

Because it is unclear to what extent the district court relied on finality concerns in denying the Samish's motions, especially after the Samish submitted a proposal for minimizing the disruptive effects of its participation in *Washington I*, we conclude that finality concerns do not independently support the district court's denial of the Samish's Rule 60(b)(6) motion. That is, had the district court properly concluded that federal recognition was an

extraordinary circumstance the somewhat speculative concerns about finality are insufficient to have carried the day.

The Opposition Tribes' point is well taken that "[h]aving supervised the litigation since 1970, the district court is in the best position to judge the impact adding new parties might have."[13] Nevertheless, the fact that the district court has ongoing judicial supervision of *Washington I* undercuts these finality concerns. Unlike a judgment between private parties, the allocation of natural resources between treaty tribes and others cannot help but be an ongoing venture. Indeed, the 17,500 docket entries and more than 50 separately-numbered sub-proceedings in *Washington I* are testament to the inherent *lack* of finality of the judgment. Finally, the fact that the government and the Opposition Tribes in *Washington II* argued that Samish recognition could well justify reopening further weakens finality concerns.

CONCLUSION

For the foregoing reasons we reverse the order of the district court denying the Samish's Rule 60(b)(6) motion and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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13. We note, however, that a number of different district judges have presided over various parts of this case in the 34 years that it has been pending in the Western District of Washington.

Appendix A

BEA, Circuit Judge, dissenting.

Appellant Samish Indian Tribe ("Samish Tribe") appeals the district court's order denying the Samish Tribe's motion pursuant to Federal Rule of Civil Procedure 60(b)(6) for relief from the district court's prior judgment in *United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash.1979), *aff'd*, 641 F.2d 1368 (9th Cir.1981) ("*Washington II*"). The majority opinion holds that the district court abused its discretion in denying the Samish Tribe's Rule 60(b)(6) motion because "[f]ederal recognition [of the Samish Tribe] is determinative of the issue of tribal organization, the issue upon which the Samish were denied treaty fishing rights in *Washington II*," and "[a]s the Samish's lack of recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*." Op. at 1161.

With respect, I believe the majority opinion errs in two regards. *First*, federal recognition as a tribe has never been required to establish off-reservation fishing rights pursuant to the Treaty of Point Elliott (1855), and the Samish Tribe was not precluded in *Washington II* from presenting evidence of having maintained an organized tribal structure, which evidence could have supported a finding that it was entitled to such treaty fishing rights. *Second*, neither the federal recognition of the Samish Tribe by the Bureau of Indian Affairs ("BIA") nor the BIA's underlying factual findings constitute evidence that the Samish Tribe maintained an organized tribal structure to which a district court determining treaty status must accord any deference. Because I believe

the majority opinion departs from our jurisprudence in holding otherwise,[1] I respectfully dissent.

I.

A.

The issue before this court is not whether the Samish Tribe might qualify for off-reservation fishing rights pursuant to the Treaty of Point Elliott were it to commence an action today. Rather, as the majority opinion states: "The crucial issue here is whether the fact that the Samish had the opportunity to litigate this issue in *Washington II* means that the Samish were not 'prevented . . . from proceeding with the prosecution or defense of the action in a proper fashion.'" Op. at 1159 (internal citation omitted). The majority opinion answers in the negative; I believe our precedent requires an affirmative answer.

Our precedent in this area of the law and with regard to the very parties at issue here makes clear, if nothing else, that whether a group of Native Americans are recognized as a tribe by the federal government is a distinct legal inquiry from whether that same group of Native Americans qualify

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1. Except "'when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point,'" "[a] three-judge panel generally has no power to overrule a decision of this court." *Rotec Industries, Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n. 3 (9th Cir.2003). Rather, "[s]uch a ruling may be handed down [only] by an en banc panel of this court or the United States Supreme Court (and state high courts on issues of state law)." *Id.*

for off-reservation fishing rights pursuant to the Point Elliott and related treaties. Further, recognition as a tribe is *not* a necessary precondition to qualify for such treaty fishing rights.[2]

Thus, in *United States v. Washington*, 520 F.2d 676, 692-93 (9th Cir.1975) ("*Washington I*") (emphasis added), we held: "Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, *but can have no impact on vested treaty rights.*" Likewise, when the district court in *Washington II* held that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States," 476 F.Supp. at 1111, we held on appeal:

> This conclusion is clearly contrary to our prior holding and is foreclosed by well-established precedent. . . .
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> * * *
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> We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure.

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2. This precedent in no way renders federal recognition a nullity. Rather, "[f]ederal recognition brings its own obvious rewards, not the least of which is the eligibility of federal money for tribal programs, social services and economic development." *Greene v. United States*, 996 F.2d 973, 978 (9th Cir.1993) ("*Greene I*").

Washington II, 641 F.2d at 1371, 1372; *accord id.* at 1374 (Canby, J., dissenting) ("The majority opinion quite correctly rejects the conclusion of law that federal recognition is essential to the exercise of treaty rights."). In *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 n. 10 (9th Cir.1990) (emphasis added), we noted that "*[f]ederal recognition by the Department of Interior is not required for a tribe to obtain treaty tribe status.*" Again, in *Greene I*, "[w]e recognize[d] that the two inquiries are similar," but reiterated that "each determination serves a different legal purpose and has an independent legal effect" and that "*[f]ederal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott.*" 996 F.2d at 976 (emphasis added); *accord id.* at 981 (Reinhardt, J., dissenting) (arguing that "federal recognition *necessarily* qualifies for treaty rights a tribe that claims them," but acknowledging that "federal recognition is not a precondition to receiving treaty rights") (emphasis in original). Finally, in *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir.1995) ("*Greene II*"), we reviewed our precedent and held once more: "[T]he recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights. . . . Our decision in [*Greene I*] can leave no serious doubt that our court regards the issues of tribal treaty status and federal acknowledgment as fundamentally different."[3]

Our precedent is equally clear that although recognition as a tribe may be a decision generally left to the discretion of

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3. In light of this precedent, the majority opinion's statement that "the Samish's inability to exercise their treaty fishing rights hinged on their status as an unrecognized tribe," Op. at 1155, is inexplicable.

the Executive Branch, "[w]hether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure [so as to qualify for off-reservation fishing rights pursuant to the Point Elliott and related treaties] is a factual question which a district court is competent to determine." *Washington I*, 520 F.2d at 693; *accord Washington II*, 641 F.2d at 1371.

Thus, the fact alone that the Samish Tribe was not recognized by the federal government at the time of *Washington II* in no way prevented it from proffering the type of evidence that could have resulted in a finding by the district court in *Washington II* that the Samish Tribe had maintained an organized tribal structure and, therefore, was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott. Indeed, two other tribes did precisely this. Specifically, in *Washington I*, the district court held that the Stillaguamish Tribe and Upper Skagit Tribe were both entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott *despite the fact that they were not at the time recognized as tribes by the federal government. United States v. Washington*, 384 F.Supp. 312, 378-79, 406 (W.D.Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir.1975) ("*Washington I*"). We affirmed:

> The Stillaguamish and Upper Skagit Tribes ... are not recognized as organized tribes by the federal government. . . . Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the

Appendix A

Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Washington I, 520 F.2d at 692-93. Nor, finally, has the Samish Tribe alleged, much less proved, that the evidence demonstrating that it was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott was unavailable at the time of the trial held in *Washington II* to adjudicate this issue.

Because the Samish Tribe has presented no evidence that it was precluded from doing precisely what the Stillaguamish and Upper Skagit Tribes did, it has not shown that it was "'prevented . . . from proceeding with the prosecution or defense of the action in a proper fashion,'" Op. at 1159, such that its recognition as a tribe now should permit it to set aside the judgment in *Washington II.*[4]

B.

Despite this clear, consistent and controlling authority, the majority opinion "conclude[s] that the Samish were effectively prevented from proving their tribal status 'in a proper fashion'" for three reasons:

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4. Nor, as the majority opinion recognizes, is the fact "[t]hat an ALJ arrived at a different factual finding [as to federal recognition] on better evidence . . . a reason for granting a Rule 60(b)(6) motion. *See Alpine Land & Reservoir Co.,* 984 F.2d at 1049 (holding that Rule 60(b)(6) 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment')." Op. at 1159.

> [1] the government's 'excessive delays and . . . misconduct' in withholding of recognition from the Samish, a circumstance beyond their control; [2] the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue; and [3] the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boilerplate findings of fact in *Washington II*. . . .

Slip op. at 122. But none of these factors supports granting the Samish Tribe's Rule 60(b)(6) motion.

First, although the Samish Tribe initially applied for federal recognition in 1972 and were not finally recognized until 1996, whether the Samish Tribe was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott was an issue tried and submitted before the district court in *Washington II* in 1977. *Greene v. Babbitt,* 943 F.Supp. 1278, 1281 (W.D.Wash.1996) ("*Greene III*") (date of initial application for federal recognition); 61 Fed.Reg. 15825 (date of federal recognition); *Washington II,* 641 F.2d at 1371 n. 4 (date of submission before district court). Thus, the majority if not all of the "'excessive delays and . . . misconduct,'" Op. at 1159, on which the majority opinion relies occurred after the issue was tried and submitted in *Washington II.*

Further, as noted above, there is no showing that the five-year delay immediately following the Samish Tribe's application for federal recognition to the BIA precluded the

Samish Tribe from submitting to the district court in *Washington II* the same evidence of having maintained an organized tribal structure that it had submitted or thereafter would submit to the BIA. Nor is there evidence that the Samish Tribe applied for a postponement of their treaty-rights trial and submission to allow the BIA to determine its recognition claim.

Second, "the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue," Slip op. at 122, is irrelevant to whether a case is made out for Rule 60(b)(6) relief. The government's position in no way hindered, much less precluded, the Samish Tribe from offering evidence in the *Washington II* district court trial of having maintained an organized tribal structure that could have resulted in a finding by that district court that the Samish were entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott, as did the unrecognized Stillaguamish and Upper Skagit Tribes. Nor can the Samish Tribe claim the government is estopped to require evidence of having maintained an organized tribal structure by its statement that the issue of treaty rights might be subject to review were the Samish Tribe federally recognized. Any reliance on these statements was unreasonable in view of our holdings. As noted above, even prior to *Washington II*, we had held in *Washington I* that federal recognition as a tribe is *not* a necessary precondition for off-reservation fishing rights pursuant to the Treaty of Point Elliott and that district courts are competent to make the necessary determinations:

> The Stillaguamish and Upper Skagit Tribes . . . are not recognized as organized tribes by the

> federal government. . . . Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine.... Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Washington I, 520 F.2d at 692-93 (internal citations omitted). Accordingly, in *Washington II*, we characterized arguments otherwise as "*clearly* contrary to" and "foreclosed by *well-settled* precedent." 641 F.2d at 1371 (emphasis added).

Third, nor is "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boilerplate findings of fact in *Washington II*," Op. at 1159, relevant. On appeal, as noted above, we expressly corrected the district court's erroneous conclusion. *Washington II*, 641 F.2d at 1371 ("[The district court's] conclusion is clearly contrary to our prior holding and is foreclosed by well-settled precedent."). Noting that "[t]he district court's statement that federal nonrecognition is decisive, together with its listing of other purported considerations,

makes it difficult for us to determine the precise basis for the court's holding that the tribes may not exercise treaty rights," we then "examine[d] the record" ourselves "to determine whether the district court reached the correct result." *Id.* at 1372.

> [T]he district court specifically found that the appellants had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communit(ies).'
>
> *After close scrutiny, we conclude that the evidence supports this finding of fact.* Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required.
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> The appellants' members are descended from treaty tribes, but they have intermarried with non-Indians and many are of mixed blood. That may be true of some members of tribes whose treaty status has been established. But unlike those persons, those who comprise the groups of appellants have not settled in distinctively Indian residential areas.
>
> We cannot say, then, that the finding of insufficient political and cultural cohesion is clearly erroneous.

Washington II, 641 F.2d at 1373-74 (emphasis added; internal citations omitted).

Indeed, the argument that the district court's erroneous conclusion of law in *Washington II* so "permeated the entire factual history," *id.* at 1375 (Canby, J., dissenting), that the findings of fact could not be relied upon even by this court when it applied the correct standard is one that was heralded by the dissent in *Washington II* and, as demonstrated above, rejected by the majority:

> My difference with the majority is that I am unable to say that the findings of the district court resolve the determinative question of tribal continuity or provide us with the means to do so upon review.
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> * * *
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> [T]he conclusions of law help to illustrate the deficiencies of the findings of fact upon which the decision of the district court is based. The findings that appellants had not maintained a 'continuous separate, distinct and cohesive Indian cultural or political communit(ies)' or 'organized tribal structure(s) in a political sense' amounted in context to findings that appellants lacked federal recognition or attributes necessarily dependent upon federal recognition. These findings consequently do not resolve the crucial factual issue and cannot support the judgment. Application of the proper legal standards to this case requires new determination of fact, and

> possibly additional evidence relating to the political organization of the relevant tribes at treaty times. I would therefore remand the matter to the district court for determinations whether appellants have maintained tribal structures reflecting the degree of organization that existed at the time of the treaties, with reasonable allowances for adaptation to changing conditions, and whether some defining characteristic of the original tribes persists in appellants as evolving tribal communities.

Id. at 1374, 1375-76 (Canby, J., dissenting). The majority opinion recognizes that this is an argument already made and rejected, Op. at 1155 n. 3, but pays no heed to the crucial finding of not having maintained an organized tribal structure, approved by our decision. Such insouciance to our precedent is inadvisable.

II.

Although acknowledging that "we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights," the majority opinion asserts that "this is an inevitable conclusion." Op. at 1158. Again, this is contrary to our precedent.

In *Greene I*, what was thereafter recognized as the Samish Tribe appealed to the district court from the BIA's denial of the Samish Tribe's petitions for recognition. 996 F.2d at 975. The Tulalip Tribe moved to intervene, asserting "two related interests": (1) "that their treaty fishing allocations are

threatened by dilution" because the "renewed administrative inquiry into the Samish tribal status will raise nearly identical questions" as those relevant to the Samish Tribe's treaty status; and (2) that "parallel determinations by the BIA will undermine the precedential effect" of *Washington I* and *Washington II*. *Id.* at 976-77.

The district court denied the motion, holding "that the action did not implicate treaty claims," and we affirmed. *Id.* at 975. As to the first asserted interest, we held that federal recognition "serves a different legal purpose and has an independent legal effect" than does a determination whether the Samish Tribe has treaty rights: "Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and Washington II* before they could claim fishing rights." *Id.* at 976-77. As to the second asserted interest, we noted that "the district court ruled expressly that the ALJ 'will not consider' treaty rights" and "that the Samish may not use the reopened hearing [on federal recognition] to attack the [*Washington II*] decision." *Id.* at 977. Further, it held that "[a]ny attempt to relitigate treaty fishing rights would occur in the separate, ongoing *Washington I* forum, where the Tulalip are already parties." *Id.* We continued: *Washington I*" is the forum that will resolve ultimately any attempt to reallocate treaty fishing rights and that is the forum where the Tulalip *and all other interested parties* can have their say." *Id.* at 977-78 (emphasis in original).

Our holding in *Greene I* that the proper fora—if any--to relitigate the Samish Tribe's treaty rights were *Washington I and Washington II* and our promise to the Tulalip Tribe

that it would have an opportunity to protect its interests in those fora compels the conclusion that federal recognition does *not* necessarily entail treaty status. Indeed, this is clearly what we meant when we said: "Allowing the Tulalip to intervene would only further confuse the issues and postpone what may be inevitable: a direct challenge to the allocation of treaty fishing rights, *which would be fully and independently litigated in the Washington I forum.*" *Id.* at 978 (emphasis added). It would have been an empty promise—indeed, a complete deprivation of due process—to deny the Tulalip Tribe's motion to intervene in the Samish BIA recognition proceedings on the basis that it could later protect its treaty rights in the *Washington I and Washington II* courts, while all along assuming that by virtue of the Samish Tribe gaining federal recognition, the *Washington I and Washington II* courts would be required to grant the Samish Tribe treaty rights. If that was the case, where then was the Tulalip Tribe to protect its interests? Elementary principles of due process, such as the right to present evidence and to be heard before property rights are taken, require that a tribe challenging the Samish Tribe's claims to treaty rights have an opportunity to disprove the maintenance of organized tribal structure and not be precluded from offering such proof by an administrative agency determination from which the challenging tribe was excluded.

Indeed, the majority opinion's "inevitable conclusion," Op. at 1158, is precisely the argument advanced by the dissent in *Greene I*, and rejected by the majority opinion there. Dissenting, Judge Reinhardt argued that "federal recognition is tantamount to acknowledgment by the federal government

of tribal entitlement to treaty rights," *id.* at 980-81, and therefore concluded:

> As a practical matter, if the BIA reconsiders its earlier decision, granting federal recognition to the Samish, the agency's determination that the Samish have "maintained tribal political influence or other authority," 25 C.F.R. § 83.7(c), will undoubtedly carry great weight in any judicial reconsideration of Samish entitlement to treaty fishing rights.

Id. at 982. To this, the majority opinion replied:

> The dissent speculates that if the BIA reverses its decision and recognizes the Samish as an official tribe, this "will undoubtedly carry great weight in any judicial reconsideration of Samish entitlement to treaty fishing rights." In fact, such a decision would have marginal influence at best. *The* Washington I *court need not accord any deference to an agency proceeding that has been expressly limited to matter other than rights under the 1855 treaty.*

Id. at 978 (emphasis added).

Our holding in *Greene I* that the district court "need not accord any deference" to the BIA's recognition of the Samish Tribe, *id.* at 978, was affirmed in *Greene II*. There, the Secretary of the Interior appealed the district court's decision that it was formally to adjudicate under the Administrative

Procedure Act whether the Samish should be recognized as a tribe. *Greene II*, 64 F.3d at 1268. The Tulalip Tribe appeared as *amicus curiae*, and argued that the Samish were collaterally estopped from litigating tribal recognition by virtue of *Washington II*. *Id.* at 1269. We disagreed, holding that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. Dissenting, Judge Wright argued from the same premise as does the majority opinion here:

> *Washington II* precludes a finding that the Samish Tribe has 'maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.' 25 C.F.R. § 83.7(c). *Washington II* involved the same factual inquiry into the historicity of the present Samish Tribe. Such an inquiry is a necessary condition both for treaty recognition and for statutory recognition under the current BIA regulations. We have here substantial overlap in evidence and argument, save for subsequently developed evidence; and the claims, although not identical, are closely related. *See* Restatement (Second) of Judgments, § 27 (1982).
>
> * * *
>
> The factual finding regarding the Samish Tribe's historicity in *Washington II* precludes what would be a near identical inquiry in this case.

Id. at 1276. The majority opinion in *Greene II* rejected this argument, noting that in *Greene I* "[w]e . . . squarely rejected

the Tulalip's position that federal recognition of the Samish would be inconsistent with *Washington I* and *Washington II*" and "agreed with the district court . . . that the question of federal recognition as a tribe 'did not implicate treaty claims.'" *Id.* at 1271.

Indeed, basic rules of judicial review, collateral estoppel and evidence dictate this result. The factual findings underlying the BIA's recognition of the Samish Tribe are adjudicative in nature and, thus, not entitled to *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Further, any proceeding in district court resulting from the Samish Tribe's successful Rule 60(b)(6) motion will not be the equivalent of an appeal of the BIA's underlying factual findings, and, thus, the district court does not owe those factual findings the sort of deference reviewing courts typically owe. Further, even independent of *Greene II*, the Tulalip Tribe and others not a party to the BIA proceedings and who did not control those parties to the proceedings, did not agree to be bound by the proceedings and were not represented in the proceedings, cannot be collaterally estopped from relitigating the BIA's underlying factual findings. *See* Restatement (Second) of Judgments §§ 27, 39-42 (1982). Finally, any testimony introduced during the BIA proceedings is hearsay as to treaty-rights litigation and should be barred upon objection by the Tulalip Tribe or others that did not themselves nor did their predecessors in interest have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" during the BIA proceedings. Fed.R.Evid. 804.

Our precedent holds—and, for the reasons explained above, rightly so—that "[f]ederal recognition does not self-execute treaty rights claims," *Greene I*, 996 F.2d at 977, and "[e]ven if the federal government says that the Samish are an official Indian tribe, whether they may fish as a treaty tribe in common with [other tribes] is another question." *Id.* at 975. The majority opinion's "inevitable conclusion" to the contrary, Op. at 1158, overrules this prior circuit precedent.

III.

Until now, our precedent has been both clear and consistent that whether a group of Native Americans are recognized as a tribe by the federal government is a distinct legal inquiry from whether that same group of Native Americans qualify for off-reservation fishing rights pursuant to the Point Elliott and related treaties; and, equally so, that recognition as a tribe is *not* a necessary precondition for off-reservation fishing rights. Thus, the fact that the Samish Tribe was not recognized by the federal government at the time of *Washington II* in no way prevented it (as did the Stillaguamish and Upper Skagit Tribes) from putting forth the type of evidence of having maintained an organized tribal structure that could have resulted in a finding by the district court in *Washington II* that the Samish Tribe was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott. Nor has the Samish Tribe adduced any evidence that it was precluded from so doing.

Further, as we have previously held, federal recognition does not compel status under the Point Elliott and related treaties, and, indeed, a district court "need not accord any

deference to an agency proceeding that has been expressly limited to matter other than rights under the 1855 treaty." *Greene I*, 996 F.2d at 978.

Accordingly, I would affirm the order of the district court.

APPENDIX B — ORDER DENYING THE SAMISH TRIBE'S MOTION FOR RECONSIDERATION FILED FEBRUARY 7, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C70-9213

Subproceeding No. 01-2

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

and

SAMISH INDIAN NATION

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON, et al.,

Defendants.

ORDER DENYING THE SAMISH TRIBE'S MOTION FOR RECONSIDERATION

Before the court is the Samish Indian Tribe's motion for reconsideration of the court's December 19, 2002 Order Denying the Tribe's Motion to Reopen. In that order, the court

found that two factors weighed against the Samish's request to reopen the judgment in *United States v. Washington* ("*Washington II*"): first, that the Samish's 1996 federal recognition was not an "extraordinary circumstance" for purposes of Rule 60(b)(6), and, second, that the interests in finality were substantial given the numerous fish allocation and management agreements that would be disrupted by the Samish's intervention. In the instant motion, the Samish ask the court to reconsider both conclusions.[1]

As to the first, the Samish contend that the court committed manifest error in ruling that the Tribe's recognition was not an "extraordinary circumstance" since, in the Tribe's paraphrase, "the Ninth Circuit clearly ruled that the Samish Tribe would be given a full and independent opportunity to litigate its treaty status if it obtained recognition." Mot. at 6. The Ninth Circuit never made such a ruling. In *Green v. United States*, 996 F.2d 973 (9th Cir. 1993), the Ninth Circuit concluded that the Tulalip Tribe could not intervene in the Samish's recognition proceeding because recognition did not implicate treaty rights. In response to the Tulalip Tribe's arguments, the Ninth Circuit acknowledged that the Samish, if recognized, might next seek to assert fishing rights, but the court concluded that, even so, the Tulalip's treaty interests were not "practically impaired" since recognition and treaty rights were unrelated. *Id.* at 978. The court never even suggested that the Samish would be entitled to reopen *Washington II* upon obtaining

1. Because the court is not persuaded that it committed manifest error in its order, it has not asked for responsive briefing from the other parties.

recognition. Any other construction of the Ninth Circuit's statements in *Greene* is untenable.[2]

The court's rulings regarding the effect of the Samish's recognition are not, or so it would appear, what truly prompted the instant motion. The primary focus of the Tribe's motion concerns whether the Tribe's intervention would in fact be unduly disruptive to the many management and allocation agreements in this case. The Samish assert that necessary information concerning such agreements was not forthcoming from other tribal parties, precluding the Samish from addressing the disruption concerns in settlement proposals. The Samish further state that at oral argument on the motion, counsel for the Tulalip Tribe revealed a "new fact" — namely, that all such agreements and orders are matters of public record. This statement, according to the Samish, contradicted previous representations by tribal counsel that the contents of such agreements were unavailable. Having now examined these agreements, the Samish submit a proposal that purports to "address all possible disruptions its participation in *U.S. v. Washington* might entail." Mot. at 3.

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2. It is worth mentioning, moreover, that none of the issues before the court on the Samish's motion to reopen — such as the requirements of Rule 60(b)(6) and the finality interests — were before the Ninth Circuit in *Greene*. Therefore, whatever remarks the Ninth Circuit made about the prospect of the Samish returning to this forum should be construed warily. This is especially true in light of the Ninth Circuit's statement that Samish recognition "would have marginal influence at best" on the Tribe's entitlement to fishing rights. *Greene*, 996 F.2d at 978.

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Notwithstanding the Samish's efforts to craft a workable, minimally disruptive framework for the Tribe's intervention, the court is unpersuaded that the interests in finality can or should be overcome in this case. Under any scenario, the Samish, in addition to the other newly recognized Tribes likely to seek intervention, would necessarily inject themselves into sensitive agreements and upset current treaty tribes' allocations. The Samish assert, however, that they are "initially" interested only in "ceremonial and subsistence treaty fishing rights" and that such an exercise of fishing rights would not "cause financial impacts to other tribes." Mot. at 4. But the Samish themselves admit they will likely want to engage in commercial fishing one day and that intra-tribal allocation disputes requiring court intervention might therefore arise. Mot. at 4-5. The court remains of the opinion that finality is an overriding concern in this case.

Such finality concerns, however, were not the sole or even the chief basis for denying the Tribe's motion to reopen. The court recognizes the effort the Samish have made to draft a practicable framework for intervention, but such efforts are futile unless the Tribe can demonstrate that, under Rule 60(b), it should be allowed to reopen the judgment. To focus on mitigating the effects of reopening a judgment, rather than on whether reopening a judgment is procedurally allowable, is to put the cart before the horse. In the earlier Order, the court noted the reasons that Rule 60(b)(6) could not be used to relieve the Samish of the final judgment in *Washington II*. Among those reasons is that, unlike in other instances in which Rule 60(b)(6) was successfully invoked, the Tribe has never challenged the fairness of the *Washington II* proceeding. During that proceeding, the Samish had a full

and fair opportunity to prove its entitlement to fishing rights and failed to do so. In its motion to reopen, the Tribe never argued that there was a fundamental defect in that earlier proceeding, which defect constitutes an "extraordinary circumstance."

The court need not reiterate all of the bases for denying the Tribe's motion to reopen. It is enough to note, however, that, even putting aside the finality concerns that the Samish seek to allay in the instant motion, there are ample reasons to deny the Tribe another chance at litigating its treaty status. No less than three courts have decided the issue against the Samish. Rule 60(b) was not designed to allow parties numerous bites at the same apple absent certain extraordinary circumstances not present in this case.

CONCLUSION

For the foregoing reasons, the motion for reconsideration [docket no. 69-1] is hearby DENIED.

DATED at Seattle, Washington this 7th day of February, 2003.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER DENYING THE SAMISH TRIBE'S MOTION TO REOPEN JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE ENTERED AND FILED DECEMBER 19, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C70-9213

Subproceeding No. 01-2

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

and

SAMISH INDIAN NATION

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Appendix C

ORDER DENYING THE SAMISH TRIBE'S MOTION TO REOPEN JUDGMENT

THIS MATTER comes before the court on the Samish Indian Tribe's (hereinafter "Samish" or "Tribe") motion, filed pursuant to Rule 60(b) (6), to reopen the judgment in *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd* 641 F.2d 1368 (9th Cir. 1981). In this motion, the Tribe argues that its 1996 federal recognition from the Department of Interior is an "extraordinary circumstance" that warrants reexamination of its treaty fishing rights under the Treaty of Point Elliott, which rights were previously denied the Tribe. Nine of the 22 treaty tribes (referred to herein as the "Opposition Tribes"), fearing dilution of their fish harvest and disruption of long-standing allocation and management agreements, oppose the Samish's motion, as does, by separate pleading, the United States.[1] The Opposition Tribes and the United States believe both that there are procedural bars to the Samish's motion and that the Tribe's federal recognition is not an "extraordinary circumstance" that justifies reopening this case.

Having reviewed the documents filed in support of and in opposition to this motion, and considered the parties' oral arguments, the court finds and rules as follows:

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1. The State of Washington has filed a brief statement of non-opposition to the Samish's motion.

Appendix C

I. BACKGROUND

A. *Treaty Fishing Rights*

In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought suit seeking an injunction requiring the State to protect those tribes' share of runs of anadromous fish. Seven other tribes intervened as plaintiffs. In 1974, United States District Judge Boldt ruled that all fourteen tribes had treaty fishing rights under several Indian treaties, including the Treaty of Point Elliott, which entitled them to take up to fifty percent of the harvestable fish passing through their off-reservation fishing grounds. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Washington I*"). *Washington I* declared the treaty fishing rights of only those "14 Indian entities" that had participated as plaintiffs in that proceeding and that were defined as "Treaty Tribes" in the ruling.[2] 384 F. Supp. at 405. *Washington I* contemplated that additional Indian entities might become parties in the case if any such entities demonstrated that it was "entitled to exercise fishing rights under the treaties construed herein within the Western District of Washington." *Id.*

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2. On appeal, the State challenged Judge Boldt's confirmation of Treaty rights for the then-unrecognized Stillaguamish and Upper Skagit, Sauk-Suiattle tribes, which thereafter attained federal recognition between Judge Boldt's decision and the appeal. The Ninth Circuit affirmed Judge Boldt's conclusion that these tribes were entities possessing treaty rights, holding that "[n]onrecognition of the tribe by the federal government . . . can have no impact on vested treaty rights." *United States v. Washington*, 520 F.2d 676, 692 (9th Cir. 1975).

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On September 20, 1974, shortly after Judge Boldt's initial decision, the Samish Tribe, as well as the Duwamish, Snohomish, Steilacoom, and Snoqualmie Tribes, moved to intervene in *United States v. Washington,* to assert their own treating fishing rights. Judge Boldt referred the issue of the Samish's treaty status to Magistrate Judge Robert Cooper sitting as a Special Master. After a five-day trial, Magistrate Judge Cooper deter-mined that the Samish was neither a treaty tribe nor a political successor to the signatory treaty tribe.

The Samish appealed this determination to Judge Boldt, who thereafter conducted a *de novo* evidentiary hearing. The Samish submitted additional evidence to Judge Boldt, who heard argument in January 1977. Judge Boldt issued his decision in March 1979, ruling that the Samish were not a Treaty Tribe as defined in *Washington I* and that its members were not entitled to exercise treaty rights under the Treaty of Point Elliott. *United States v. Washington,* 476 F. Supp. 1101, 1111 (W.D. Wash. 1979) ("*Washington II*"). Judge Boldt found that the Samish Tribe was not a successor in interest to any treaty signatory and had not maintained an organized tribal structure. *Id,* at 1106. Judge Boldt also concluded that the Samish were not entitled to exercise treaty rights because the Tribe was not "federally recognized" by the United States Department of Interior (DOI). *Id.* at 1111.

The Samish appealed Judge Boldt's ruling to the Ninth Circuit, arguing *inter alia* that Judge Boldt improperly adopted without substantial change the proposed findings and conclusions submitted by the United States. *United States v. Washington,* 641 F.2d 1368, 1371 (9th Cir. 1981). The

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Samish also appealed Judge Boldt's Finding of Fact No. 27, in which Judge Boldt found that the Samish had "not lived as a continuous separate, distinct and cohesive Indian cultural or political community." 476 F. Supp. at 1105. Because Judge Boldt had in fact adopted most of the United States' proposed findings of fact and conclusions of law, the Ninth Circuit applied close scrutiny to the Samish's claims. The Ninth Circuit concluded that Judge Boldt had applied an incorrect legal test in determining whether a tribe had treaty rights. Rejecting the notion that federal recognition or nonrecognition was dispositive, the Ninth Circuit instead stated that the "single necessary and sufficient condition for the exercise of treaty rights is" whether a "group of Indian descendants . . . have maintained an organized tribal structure." 641 F.2d at 1372.

Applying this test to the record, the Ninth Circuit concluded "[a]fter close scrutiny, . . . that the evidence supported [Judge Boldt's] finding of fact" that the Samish had not functioned since treaty times as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." *Id.* at 1373. As for the effect of the Samish's nonrecognition, the court stated that "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." *Id.* The court, therefore, affirmed Judge Boldt because "the district court correctly resolved this question despite its failure to apply the proper standard." *Id.* at 1374. The Samish appealed this decision to the United States Supreme Court, which denied certiorari. 454 U.S. 1143 (1982).

By the early 1980s, therefore, the Samish Tribe had failed to persuade at least three judicial bodies — Magistrate Judge Cooper, Judge Boldt, and the Ninth Circuit — that it was entitled to be a party to this case.

B. *Federal Recognition Proceeding*

In 1972, after Congress began conditioning eligibility for most programs benefitting Indians upon status as a federally recognized tribe, the Samish first sought federal recognition. *See* 25 U.S.C. §§ 450-450n. In 1978 the DOI published final regulations governing the procedure for official recognition of Indian Tribes. Apparently, the DOI took no action on the Samish's original petition until after the 1978 regulations were promulgated, and the Samish filed a revised petition under the new regulations in October 1979. Thereafter, the Bureau of Indian Affairs (BIA) conducted an independent inquiry into the Samish's recognition petition. The recognition petition was denied first in 1982, when the Assistant Secretary for Indian Affairs first published a preliminary determination concluding that the Samish should not be recognized. Samish objected to this decision and submitted a response and additional information and, after several years of delay, the Deputy to the Assistant Secretary for Indian Affairs issued a final decision in 1987 denying federal recognition to the Samish. 52 Fed. Reg. 3709 (Feb. 5, 1987).

In 1989, the Samish filed a federal action in this district, alleging that the BIA's denial of its recognition petition violated the Tribe's due process rights and that the Samish was the successor in interest to the treaty Samish Tribe for

purposes of showing entitlement to federal recognition. *Greene v. Lujan*, No. 89-645Z (W.D. Wash.).[3] The Tulalip Tribe sought to intervene in this case, believing that if Samish were to gain federal recognition, then treaty fishing rights would likely follow. Judge Zilly denied Tulalip's intervenor application but permitted it to participate as *amicus curiae*. On an interlocutory appeal, the Ninth Circuit affirmed the denial of the Tulalip's intervenor application on the grounds that "the calculus for tribal treaty rights under Ninth Circuit law is separate and distinct from that for federal acknowledgment." *Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993). Thus, the Ninth Circuit reasoned, Tulalip's interest in the recognition proceeding did not rise to intervenor status since "[e]ven if [the Samish] obtain federal tribal status, [they] would still have to confront the decisions in Washington I and II before they could claim fishing rights." *Id*.

On the merits, Judge Zilly held that the Samish had been denied due process in the recognition proceedings and vacated the decision denying recognition and remanded the recognition petition to the DOI for formal adjudication under the Administrate Procedure Act (APA). February 25, 1992 Order, 1992 WL 533059. The Ninth Circuit affirmed Judge Zilly's due process ruling, requiring an APA due process hearing for the Samish. *Greene v. Babbitt*,, 64 F.3d 1266 (9th Cir. 1995).

On remand, Administrative Law Judge (ALJ) David Torbett of the DOI Office of Hearings and Appeals conducted

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3. Bruce Babbitt was later substituted for Manuel Lujan as Secretary of the Interior.

an APA due process hearing on the Samish's recognition proceeding. After an eight-day hearing, on August 31, 1995 Judge Torbett issued recommended findings of fact and conclusions of law in favor of Samish recognition.

In his recommended decision, ALJ Torbett found that the Samish met all seven mandatory criteria necessary for federal recognition as an Indian tribe. *See* 25 C.F.R. § 83.7 (1993). Reviewing ALJ Torbett's decision, the Assistant Secretary for Indian Affairs rejected some of his findings and conclusions, but ultimately ruled in favor of Samish recognition on November 8, 1995. The Samish appealed these rejections, and Judge Zilly reinstated the finding of fact and conclusions of law that had been rejected and affirmed the Samish recognition decision. *Green v. Babbitt*, 943 F. Supp. 1278, 1288-89 (W.D. Wash. 1995).

Now, having achieved federal recognition, the Samish set out again,[4] pursuant to Rule 60(b) (6), to reopen the judgment in this case.

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4. An earlier, unrelated attempt to set aside the judgment in *Washington II* occurred on November 22, 1993, when three Tribes, including the Samish, moved for relief under Rule 60(b)(6) on the grounds that Judge Boldt might have been mentally incompetent at the time he signed the final findings in the case. This court, on January 23, 1995, denied the motion on three grounds: (1) that courts should avoid the finality of judgments; (2) that a ruling for the Tribes would open the floodgates to future challenges to judgments on grounds of judicial incompetence; and (3) the Tribes suffered no manifest injustice since the magistrate judge and the Ninth Circuit reached the same conclusion as Judge Boldt. The Ninth Circuit affirmed this court's ruling. *United States v. Washington*, 98 F.3d 1159 (9th Cir. 1996).

Appendix C

II. DISCUSSION

A. *Rule 60(b)(6) Standards*

Federal Rule of Civil Procedure 60(b) permits a court to relieve a party from an otherwise final judgment. Rule 60(b) states in relevant part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons. . . ." The Rule then identifies five specific provisions, for such things as mistake, discovery new evidence, fraud, etc., that could be grounds for relief under the Rule. Subsection (b)(6) acts as a "catch-all" provision, stating that a court may grant relief from a judgment if there is "any other reason justifying relief from the operation of the judgment." This provision applies only when there are reasons for relief other than those set out in the more specific clauses of Rule 60(b). *See Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 & n.11 (1988).

Rule 60(b)(6) "does not particularize the authority adequate to enable [courts] to vacate judgments whenever such action is appropriate to accomplish justice, [but it should] only be applied in extraordinary circumstances." *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996) (internal citations and quotations omitted). The Ninth Circuit has cautioned that the Rule should be used "sparingly as an equitable remedy to prevent manifest injustice" and only "where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Id.*

Rule 60(b) is designed to allow courts to reconsider both factual findings and legal conclusions under the limited circumstances permitted by the Rule. Thus, even though the issue of the Tribe's treaty status has been previously litigated, this court is not barred from reconsidering *Washington II* were it to find the existence of circumstances under the Rule that warrant it.[5]

B. ***Motion to Reopen***

While numerous issues are raised in this matter, the court is of the opinion that there are two principal issues:

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5. The court is mindful of the fact that Judge Zilly, in the recognition litigation, ruled that the Samish were precluded by *Washington II* from litigating its treaty tribe status. *See,* Order, 1992 WL 533059 at 2. While Judge Zilly could not, in unrelated litigation, properly reconsider the findings and conclusions in *Washington II,* this court is not barred from such reconsideration if there are "extraordinary circumstances" within the meaning of Rule 60(b) that justify it. To hold otherwise would preclude Rule 60(b) motions, since the non-moving party could always plead *res judicata.*

A related issue, raised by the United States, is whether this court can properly consider the Samish's motion in light of the Ninth Circuit's decision affirming *Washington II.* This issue is easily resolved. In *Standard Oil Co. of Cal. v. United, States,* 429 U.S. 17 (1976), the Supreme Court stated that an appellate mandate "relates to the record and issues then before the court, and does not purport to deal with possible later events." *See also* 11 Wright, Miller & Kane, Federal Practice & Procedure § 2873 (1995) ("An appellate court may not know whether the requirements for reopening a case under the rule are met until there has been a full record developed. Such a record can only be made in the trial court.").

(1) whether the Samish's federal recognition is an "extraordinary circumstance" that justifies reopening the judgment in *Washington II*; and (2) whether the interests in finality are paramount to other interests. Each is discussed below.

1. *"Extraordinary Circumstances"*

The primary inquiry on any motion under Rule 60(b)(6) is whether there are "extraordinary circumstances" that warrant vacating the judgment. *United States v. Washington*, 98 F.3d at 1163. Thus, the burden is on the Samish to show that their achievement of federal recognition constitutes an "extraordinary circumstance" in this context.

From the outset, the Samish face a significant burden because it has been well established that federal recognition does not necessarily restore Samish treaty rights. *See Washington I*, 520 F.2d at 692 ("Nonrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact vested treaty rights."). Indeed, the Ninth Circuit has been clear that it "regards the issues of tribal treaty status and federal acknowledgment as fundamentally different." *Greene*, 64 F.3d at 1270. The Ninth Circuit denied the Tulalip Tribe's attempt to intervene in the Samish recognition proceeding because it "disagreed with their position that Samish success [in the recognition proceeding] would undermine the finality of the *Washington II* decision." *Id.* at 1271. Put even more sharply, the Ninth Circuit has stated that "[f]ederal recognition is not a threshold condition a tribe must establish to [exercise treaty rights]" and that the Samish's recognition would have a "marginal

influence at best" on the determination of whether the Tribe may exercise treaty rights. *Greene*, 996 F.2d at 976, 978. Thus, the Samish's position that federal recognition is an "extraordinary circumstance" in this case is seemingly at odds with the Ninth Circuit's pronouncements to the contrary.

Indeed, the kind of "extraordinary circumstances" usually alleged in Rule 60(b)(6) motions are not present here. That is, the Samish have not alleged that the *Washington II*, proceeding was in any way inadequate or defective, precluding the Samish from adducing all evidence to support its claim to treaty fishing rights. The absence of such allegations is significant. The Samish have not identified, nor has the court's research revealed, an instance in which Rule 60(b)(6) was successfully invoked where there was no allegation or finding that the underlying proceeding had fundamental flaws. *Cf., e.g., Liljeberg*, 486 U.S. at 863 (setting aside the judgment because the trial judge had a conflict of interest and failed to recuse himself); *Klapprott v. United States*, 335 U.S. 601 (1949) (setting aside denaturalization judgment because at the movant was unable to defend himself in the proceeding due to imprisonment); *Ervin v. Wilkinson*, 701 F.2d 59, 61-62 (7th Cir. 1983) ("Where the moving party has been prevented from presenting the merits of his case by the conduct of which he complains, Rule 60(b) relief is most appropriate.").

The Samish argue, nonetheless, that the "nature and quality of [its] recognition" is the kind of circumstance that could warrant reexamining *Washington II* and that the evidence submitted during the recognition proceeding was "substantially different" — broader and more detailed — than

the evidence it submitted in *Washington II*.[6] Samish contend that a "more detailed historical picture" emerged in the recognition proceeding and that, by meeting the standard for recognition, it also met the standard for exercise of treaty fishing rights under *Washington I*.[7]

None of these arguments is persuasive. Whatever the "nature and quality" of the Samish's recognition, the fact remains that, as discussed *supra*, a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights. The standard for treaty rights and for tribal

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6. The Samish also contend, relying on a phrase in a Finding of Fact in *Washington II*, that that decision was not intended to be the final word on its treaty status. *See Washington II*, 476 F. Supp. at 1111 ("[T]he Samish . . . [are not] *at this time* a treaty tribe in the political sense within the meaning of [*Washington I*]") (emphasis added). The Samish believe that the phrase "at this time" suggests that, should the Tribe later achieve the requisite continuity and organization of treaty tribes, the court might reconsider its treaty status. This argument merits only a brief response. First, the phrase "at this time," at the very least, admits of another interpretation — namely, that, while the Tribe might have at one time exhibited the attributes of a treaty tribe, it no longer did so. Second, the standard for exercise of treaty rights includes, *inter alia*, that a tribe "have *maintained* an organized tribal structure," which suggests that a break in that necessary structure forecloses a tribe's ability to meet the standard.

7. The Samish point out that they could not use the Treaty of Point Elliott in the recognition proceeding. That they nonetheless achieved recognition, the Samish contend, is a testament to the strength of the evidence, as treaties are the primary way of showing recognition.

recognition, while similar, are not identical, with "each determination serv[ing] a different legal purpose and ha[ving] an independent legal effect." *Greene*, 996 F.2d at 976. To gain federal recognition, the Samish had to establish the requisite social cohesion and community, continuity of political authority and ancestry from a historic tribe.[8] *See* 25 C.F.R. §§ 83-1 thru 83.7(c). To assert fishing rights, the Samish must demonstrate that they descended from a treaty signatory and "have maintained an organized tribal structure." *Washington II*, 641 F.2d at 1372. Three different judicial bodies in *Washington II* considered the evidence the Samish submitted in that proceeding and concluded that the Tribe had not "clearly established the continuous informal cultural influence [that is] required." *Washington II*, 641 F.2d at 1373. Thus, the Samish cannot rightly argue that having met the recognition standard, it has, *a fortiori*, met the standard for asserting treaty rights.

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8. In announcing Samish federal recognition in 1996, the federal government found that the Samish met this standard:

> We find that the Samish Tribal Organization has been continuously identified through history as Indian or aboriginal, has existed as a distinct community since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe or families which became incorporated into that tribe. We conclude, therefore, that the Samish Tribal Organization has met the mandatory criteria for acknowledgment. . . .

Samish Acknowledgment Decision, Ex. 8, 61 Fed. Reg. 15826.

Furthermore, the Samish are precluded from arguing, as they appear to, that the evidence it submitted in the recognition proceeding should persuade this court that *Washington II* was wrongly decided. If, as the Samish assert, the evidence it submitted in the recognition proceeding was different and more comprehensive, creating a more "detailed historical picture," such a fact does not entitle the Tribe to relief under Rule 60(b). First, such a claim would be properly brought pursuant to Rule 60(b)(2), which requires that motions based on newly-discovered evidence be filed within one year of the judgment. Furthermore, in addition to the timeliness problem, it is not clear that the different evidence touted by the Samish was, in fact, "newly discovered" or that it could not have been produced during the *Washington II* proceeding. *Cf. Frederick S. Wyle P.C. v. Texaco Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (stating that "movant is obliged to show not only that this evidence was newly discovered . . . but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing") (internal quotations omitted). There must be an end to litigation, and for that reason Rule 60(b) does not provide parties another chance at relitigating matters based on evidence gathered several years after a final judgment.

The court is mindful that the Samish's recognition decision was excessively delayed and that, had the Samish been recognized at the time it sought to intervene in *Washington II*, the outcome might have been different.[9] Such

9. Judge Zilly noted that the "Samish people's quest for federal recognition as an Indian tribe has a protracted and tortured history. (Cont'd)

speculation, however, cannot be grounds for granting relief under Rule 60(b).[10] In any event, other Washington tribes, including the Stillaguamish and the Upper Skagit, exercise treaty fishing rights even though not federally recognized. *Washington I*, 520 F.2d at 692-93. Furthermore, while the Samish's non-recognition was dispositive to Judge Boldt in *Washington II*, the Ninth Circuit, after conducting its own review employing the proper standard, concluded that the Samish had not met the standard for exercising treaty rights.

In conclusion, the court finds for the foregoing reasons that the Samish's 1996 recognition is not an "extraordinary

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(Cont'd)

and their long journey for recognition has been made more difficult by excessive delays and governmental misconduct." *Greene*, 943 F. Supp. at 1281.

10. Nor can the Tribe rely on the fact that the United States has in the past qualified its opposition to Samish intervention on the grounds that future federal recognition might justify reconsideration. The Samish stress that their potential future recognition was stressed at all stages of *Washington II* because, they argue, it was relevant in allowing the court to deny treaty status at that time. The United States cannot dispute its previous statements regarding the potential effect of Samish recognition, but it asserts only that it agreed to consider whether recognition might justify reconsideration. Whether the United States agreed to reconsider its opposition to the Samish's treaty tribe status upon federal recognition is of little moment. Samish place great weight on these statements, but there are no comparable statements *from the court* in *Washington II* that recognition might justify reconsideration. To the contrary, the Ninth Circuit in *Washington II* specifically stated that "[n]onrecognition of the tribe . . . [has] no impact on vested treaty rights." *See Washington I*, 520 F.2d at 692.

circumstance" that justifies reopening the judgment in *Washington I.*

2. *Finality concerns*

An equally compelling factor weighs against reopening the judgment in this case: the interest in finality.

The United States and the Opposition Tribes point out that, in reliance on *Washington II,* this court has approved many state-tribal fish management plans, mediated and decided intertribal disputes on treaty fishing issues, determined treaty tribes' usual and accustomed fishing places, and decided allocation issues. *See. e.g., United States v. Washington,* 626 F. Supp. 1405 (W.D. Wash. 1985) (collecting court's finding and orders including, *inter alia,* 1985 Puget Sound Salmon Management Plan and agreements between the Tulalip Tribe and other Tribe). The United States and Opposition Tribes rightly observe that management of fish harvest involves a delicate balancing of interests within the overall framework and that these management plans — achieved after considerable time and expense — would be upset by the addition of another Tribe at this late stage.

The Samish, however, do not believe that granting the instant motion will "upset the fabric" of *United States v. Washington,* arguing that state tribal fish management plans and allocation decisions will suffer minimal disruption should the Samish ultimately be granted treaty status. The Samish's accommodating intentions notwithstanding, the background of this case shows that this assertion rings false. The parties have worked diligently and extensively over th

many years this case has been active to establish management frameworks that accommodate the fiercely competing needs of the various tribes and of the State. The issues have been complicated by the increasing scarcity of fish stocks and the need to preserve and conserve certain fish species. This case over a 28-year period has proven to be a battleground where many of these issues have been fought and solutions hammered out. The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this stage, their addition would wreak havoc on hard-wrought management agreements and plans.[11]

The Supreme Court has recognized that the interests of finality, as embodied in the policies of *stare decisis* and *res judicata*, are at their zenith in cases, such as this one, which involve natural resource allocation. *See, Nevada v. United States*, 463 U.S. 110 (1983) (rejecting attempt to reopen a water rights decree to accommodate new claims to water); *Arizona v. California*, 460 U.S. 605, 620 (1983) (noting that major purpose of the case was "to provide the necessary assurance to states of the Southwest . . . of the amount of water they can anticipate to receive from the Colorado River system" and that "[r]ecalculating the amount of practicably irrigable acreable runs directly counter to strong interest in

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11. At oral argument, counsel for the United States pointed out that, in addition to the Samish, two of the other five Tribes that sought intervention in *Washington II* have attained federal recognition since that decision. Therefore, if the court were to grant the Samish intervention in *United States v. Washington*, it is likely that at least two other tribes would also move to reopen the judgment in *Washington II*, thereby potentially injecting further complications into the long-negotiated management plans in this case.

finality in this case"). Just as states in the West rely on the finality of water-rights agreements, so too do the 22 treaty tribes in this case, as well as the State of Washington, rely on the finality of fish-allocation and countless other agreements that have been entered in this case. In reliance on the finality of such agreements, the treaty tribes have invested significant time and capital to secure their take of what, for some, might be their only natural resource. Changes in allocation agreements (on which some tribes have relied for years) could have serious repercussions for already financially hard-pressed Tribes.

III. CONCLUSION

While the court recognizes that the Samish Tribe's quest for treaty fishing rights, beginning in the mid-1970s and concluding here, has taken them down a long and difficult path, and appreciates the commitment and perseverance demonstrated in this pursuit, there have been 28 years of post-*Washington I* litigation in this case, all under the assumption that *Washington II* was binding and conclusive. Reexamining the Samish intervention issue could require changing scores of orders and management plans in this case, thereby affecting the rights of 22 other treaty tribes as well as the United States and the State of Washington. Finality and certainty require that long-resolved issues in this case remain undisturbed.[12]

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12. Having found that the Samish's recognition does not constitute an "extraordinary circumstance" and that finality concerns outweigh other considerations, the court need not consider the remaining issues, including whether the Samish's motion was filed

(Cont'd)

Appendix C

Now, therefore, the motion [docket no. 39-1] is hereby DENIED.

DATED at Seattle, Washington this 19th day of December, 2002.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

(Cont'd)
within a reasonable period. Another issue of no import is the Samish's motion to strike, in which motion the Samish argue that the Opposition Tribe's brief was filed three days late. Assuming that the brief was filed late, the Samish have suffered no prejudice, having filed its reply brief, as provided by the agreed briefing schedule, thirty days after receipt of the Joint Opposition brief.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED JUNE 6, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35145

DC No. CV 70-9213 BJR
WD Wash.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

STATE OF WASHINGTON; SWINOMISH TRIBAL COMMUNITY; NISQUALLY INDIAN TRIBE; PORT GAMBLE S'KLALLAM TRIBE; LOWER ELWHA BAND OF KLALLAMS; JAMESTOWN S'KLALLAM TRIBE; SKOKOMISH INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE OF WASHINGTON STATE; UPPER SKAGIT TRIBE, Upper Skagit Indian Tribe; LUMMI NATION,

Defendants - Appellees.

SAMISH INDIAN TRIBE,

Defendant - Appellant.

Appendix D

ORDER

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

The panel has voted to deny the petitions for panel rehearing, with Judge Bea voting to grant panel rehearing. Judge Paez votes to deny the petitions for rehearing en banc and Judge Tashima so recommends. Judge Bea votes to grant the petitions for rehearing en banc. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petitions for panel rehearing and the petitions for rehearing en banc of the United States, the Seven Tribes, and the Lummi Nation and Swinomish Indian Tribal Community are denied.

APPENDIX E — COURT DECISIONS AND RELATED CASES

A. REPORTED DISTRICT COURT DECISIONS:

1. *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wa. 1974)

2. *United States v. State of Washington*, 66 F.R.D. 477 (W.D. Wa. 1974)

3. *United States v. State of Washington*, 459 F. Supp. 1020 (W.D. Wa. 1978) (compilation of major post-trial substantive orders from 9/12/74 through 6/30/78)

4. *United States v. State of Washington*, 476 F. Supp. 1101 (W.D. Wa. 1979)

5. *United States v. State of Washington*, 506 F. Supp. 187 (W.D. Wa. 1980)

6. *United States v. State of Washington*, 626 F. Supp. 1405 (W.D. Wa. 1985) (compilation of major post-trial substantive orders from 7/78 through 12/31/78)

7. *United States v. State of Washington*, 873 F. Supp. 1422 (W.D. Wa. 1994)

8. *United States v. State of Washington*, 898 F. Supp. 1453 (W.D. Wa. 1995), *amended by* 909 F. Supp. 787 (W.D. Wa. 1995)

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B. NINTH CIRCUIT DECISIONS:

1. ***United States v. State of Washington***, 520 F.2d 676 (9th Cir. 1975)

2. ***United States v. State of Washington***, 573 F.2d 1117 (9th Cir. 1978)

3. ***United States v. State of Washington Dept. of Fisheries***, 573 F.2d 1118 (9th Cir. 1978)

4. ***United States v. State of Washington***, 573 F.2d 1121 (9th Cir. 1978)

5. ***Puget Sound Gillnetter's Association v. U.S. District Court for Western Dist. of Washington***, 573 F.2d 1123 (9th Cir. 1978)

6. ***Puget Sound Gillnetter's Association v. U.S. District Court for Western Dist. of Washington***, 605 F.2d 492 (9th Cir. 1979)

7. ***United States v. Baker***, 641 F.2d 1311 (9th Cir. 1981)

8. ***United States v. State of Washington***, 641 F.2d 1368 (9th Cir. 1981)

9. ***United States v. Lower Elwha Tribe***, 642 F.2d 1141 (9th Cir. 1981)

10. ***United States v. State of Washington***, 645 F.2d 749 (9th Cir. 1981)

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11. ***United States v. State of Washington***, 694 F.2d 188 (9th Cir. 1982)

12. ***United States v. State of Washington***, 694 F.2d 1374 (9th Cir. 1982), *rehearing granted, opinion withdrawn and replaced by* 759 F.2d 1353 (9th Cir. 1985)

13. ***United States v. State of Washington***, 730 F.2d 1314 (9th Cir. 1984)

14. ***United States v. State of Washington***, 759 F.2d 1353 (9th Cir. 1985)

15. ***United States v. State of Washington***, 761 F.2d 1404 (9th Cir. 1985)

16. ***United States v. State of Washington***, 761 F.2d 1419 (9th Cir. 1985)

17. ***United States v. Skokomish Indian Tribe***, 764 F.2d 670 (9th Cir. 1985)

18. ***United States v. State of Washington***, 774 F.2d 1470 (9th Cir. 1985)

19. ***United States v. State of Washington***, 813 F.2d 1020 (9th Cir. 1987)

20. ***United States v. State of Washington***, 841 F.2d 317 (9th Cir. 1988)

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21. ***United States v. State of Washington***, 873 F.2d 240 (9th Cir. 1989)

22. ***United States v. Suquamish Indian Tribe***, 901 F.2d 772 (9th Cir. 1990)

23. ***United States v. State of Washington***, 969 F.2d 752 (9th Cir. 1992)

24. ***Greene v. United States***, 996 F.2d 973 (9th Cir. 1993)

25. ***Greene v. Babbitt***, 64 F.3d 1266 (9th Cir. 1995)

26. ***United States v. State of Washington***, 86 F.3d 1499 (9th Cir. 1996)

27. ***Confederated Tribes of the Chehalis Indian Reservation v. State of Washington***, 96 F.3d 334 (9th Cir. 1996)

28. ***United States v. State of Washington***, 98 F.3d 1159 (9th Cir. 1996)

29. ***United States v. State of Washington***, 135 F.3d 618 (1998), *rehearing granted, opinion withdrawn and replaced by* 157 F.3d 630 (9th Cir. 1998)

30. ***Muckleshoot Indian Tribe v. Lummi Indian Tribe***, 141 F.3d 1355 (9th Cir. 1998)

31. ***Washington v. Daley***, 173 F.3d 1158 (9th Cir. 1999)

32. ***United States v. Muckleshoot Indian Tribe***, 235 F.3d 429 (9th Cir. 2000)

33. ***United States v. State of Washington***, 235 F.3d 438 (9th Cir. 2000)

34. ***Muckleshoot Indian Tribe v. Lummi Indian Tribe***, 235 F.3d 443 (9th Cir. 2000)

35. ***Midwater Trawlers Cooperative v. Dept. of Commerce***, 282 F.3d 710 (9th Cir. 2002)

36. ***Midwater Trawlers Cooperative v. Dept. of Commerce***, 393 F.3d 994 (9th Cir. 2004)

C. RELATED CASES:

1. Pacific Salmon Treaty Cases:

Confederated Tribes & Bands of the Yakima Indian Reservation v. Baldrige, 898 F. Supp. 1447 (1995), *aff'd per curiam* **91 F.3d 1366 (9th Cir. 1996)**

2. Miscellaneous

Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D.Wa. 1998) (enjoining construction of marina in Muckleshoot Tribe's usual & accustomed fishing areas)

Northwest Sea Farms v. U.S. Army Corps of Engineers, 915 F.Supp. 1515 (W.D. WA 1996) (affirming denial of Corps permit to construct net pens for salmon farming that would block Lummi Nation's fishing grounds)

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DEC 7 - 2005
OFFICE OF THE CLERK

No. 05-445

In the Supreme Court of the United States

LUMMI NATION, ET AL., PETITIONERS

v.

SAMISH INDIAN TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether federal recognition of the Samish Tribe was an extraordinary circumstance pursuant to Federal Rule of Civil Procedure 60(b)(6) warranting reopening of a 20-year-old judgment holding that the Samish Tribe was not the successor in interest to a signatory of the Treaty of Point Elliot.

2. Whether the court of appeals' determination that federal recognition of the Samish Tribe warrants reopening of the previous judgment had the effect of denying due process to the Tribes whose treaty rights would be adversely affected by a reversal of the prior determination that the Samish Tribe is not the successor to a treaty Tribe.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 394 F.3d 1152. The order of the district court (Pet. App. 47a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2005. A petition for rehearing was denied on June 6, 2005 (Pet. App. 67a-68a). On August 17, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 3, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Samish Tribe is a group that believes itself to be a successor in interest to one of the Tribes with which the United States negotiated the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. That treaty is one of several treaties negotiated with the Indians of the Pacific Northwest by Washington territorial governor Isaac Stevens (Stevens Treaties). In the Stevens Treaties, the United States secured the cession of the majority of the Indians' vast territory by agreeing that the signatory Tribes would reserve, in addition to portions of their territory, their right to fish outside their reserved lands. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 661-662, 666-667 (1979). The 1974 judgment in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (*Washington I*), allocates fishing rights among successor Tribes to the signatories of the Stevens Treaties who were then residing in what is now the State of Washington.

2. Following the judgment in *Washington I*, the Samish and various other Indian groups sought unsuccessfully to intervene in the litigation. The district court denied intervention on the ground that only federally recognized Tribes could exercise treaty fishing rights. See *United States* v. *Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), aff'd, 641 F.2d 1368, 1371 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982) (*Washington II*). The Samish Tribe was not federally recognized at that time.

The court of appeals affirmed the denial of Samish's motion to intervene, although it rejected the district

court's reasoning. The court of appeals reasoned that "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." 641 F.2d at 1371 (internal quotation marks omitted). The court nonetheless upheld the denial of intervention based on its own "close scrutiny" of the facts, which led the court to conclude that the Samish and other applicants in intervention had failed to provide evidence sufficient to establish that they were successors to Tribes entitled to rights under the Treaty. *Id.* at 1373.

3. Before 1978, the Department of the Interior (Interior) maintained government-to-government relationships with federally recognized Tribes on an essentially *ad hoc* basis, and the members of such Tribes were granted benefits under various statutes and programs. In 1978, Interior established a uniform process for acknowledging Tribes that previously had not been recognized and issued final regulations establishing that process. See 43 Fed. Reg. 39,361 (1978).

Acknowledgment is granted to Indian groups that can establish that they have maintained a "substantially continuous tribal existence and * * * have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3(a). Groups apply for acknowledgment by filing a petition that addresses seven mandatory criteria set forth in the regulations, one of which is proof that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 and that a predominant portion of the petitioning group has comprised a distinct community from historical times until the present. 25 C.F.R. 83.7. Once Interior determines that a petitioner is entitled to acknowledgment as an Indian Tribe, the Tribe becomes

eligible to apply for certain programs, services, and benefits that are available only to federally recognized Indian Tribes. 25 C.F.R. 83.12; see 25 C.F.R. 83.2 ("Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.").

4. In 1972, a group identified as the Samish Indian Tribe of Washington applied for federal acknowledgment. *Greene* v. *Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995). In 1979, after Interior adopted the regulations governing its acknowledgment process, Samish filed a revised petition. The Secretary denied the petition on February 5, 1987. *Ibid.* Samish sought judicial review of the denial, claiming that Interior had violated its due process rights by failing to hold a formal hearing on its petition. Samish also renewed its effort to obtain judicial recognition of its claimed status as the successor to a Treaty signatory.

a. The district court ruled that Samish was barred from relitigating the question of its claimed treaty successorship because of the *res judicata* and collateral estoppel effects of *Washington II*. See *Greene* v. *United States*, 996 F.2d 973, 975 (9th Cir. 1993) (*Greene I*). In a separate ruling, the district court denied a petition by the Tulalip Tribe for intervention in the Samish acknowledgment proceeding, in which Tulalip argued that its interest in protecting the treaty rights it had secured in *Washington I* and *II* could be adversely affected by federal acknowledgment of Samish. Intervention was denied on the ground that Tulalip lacked the requisite interest in the Samish acknowledgment proceeding. *Id.* at 976.

b. The court of appeals affirmed both the *res judicata* and intervention rulings, holding that "[e]ven if the federal government says that the Samish are an official Indian tribe, whether they may fish as a treaty tribe in common with the Tulalip is another question." 996 F.2d at 975. The court of appeals explained the distinction as follows:

> To gain federal acknowledgment, the Samish must establish the requisite social cohesion and community, continuity of political authority and ancestry from a historic tribe. *See* 25 C.F.R. §§ 83.1 thru 83.7. To assert treaty fishing rights, the Samish must demonstrate that they descended from a treaty signatory and "have maintained an organized tribal structure." *Washington II*, 641 F.2d at 1372.
>
> * * * * *
>
> [T]he Samish need not assert treaty fishing rights to gain federal recognition. They might document repeated identification by federal and state authorities, *see* 25 C.F.R. § 83.7(a), sometime after or independent of the 1855 Treaty. Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing rights. Federal recognition does not self-execute treaty rights claims.

Greene I, 996 F.2d at 976-977.

The court of appeals rejected the argument of the Tulalip Tribe, in seeking to intervene in the acknowledgment proceedings, that factual determinations in the administrative proceedings concerning Samish's application for federal acknowledgment could be used to over-

turn the decisions in *Washington I* and *II* concerning Samish's efforts to obtain treaty fishing rights. The court reasoned that "the district court ruled expressly that the ALJ 'will not consider' treaty rights established by [*Washington II*]." 996 F.2d at 977 (citation omitted). The court of appeals further concluded that Tulalip's asserted interest in defending *Washington II* from collateral attack was "immaterial," because the district court had "explicitly ruled that the Samish may not use the reopened hearing to attack [*Washington II*]." *Ibid.* The court likewise determined that the Tulalip's concern that a decision to acknowledge Samish could undermine the finality of *Washington II* was unwarranted, because "[t]he *Washington I* court need not accord any deference to an agency proceeding that has been expressly limited to matters other than rights under the 1855 treaty. * * * Tulalip's interests are not practically impaired precisely because each action has an independent legal effect." *Id.* at 978.

c. In a separate ruling, the district court concluded that due process required a hearing on the Samish acknowledgment petition and remanded it to the agency for a formal adjudication. The United States appealed from that decision. See *Greene* v. *Babbitt*, 64 F.3d 1266 (9th Cir. 1995) (*Greene II*). Tulalip appeared as amicus curiae in that appeal to argue that Samish was collaterally estopped by *Washington II* from litigating issues concerning federal acknowledgment.

The court of appeals ruled that, while *Washington II* had "finally determined the Samish were not entitled to tribal treaty fishing rights," *Greene I* had established that "the issues of tribal recognition and treaty tribe status [are] fundamentally different." *Greene II*, 64 F.3d at 1269. The court therefore held that the *Wash-*

ington II litigation did not preclude Samish's pursuit of federal recognition as a tribe for purposes of securing benefits for its members under federal entitlement programs. The court explained that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. The court reiterated that the interests at stake in the treaty-rights litigation would not be affected by a decision to recognize Samish:

> *Greene [I]* * * * squarely rejected the Tulalip's position that federal recognition of the Samish would be inconsistent with *Washington I* and *II*. Instead, we agreed with the district court in *Greene* that the question of federal recognition as a tribe "did not implicate treaty claims." *Greene* at 975. We are bound by *Greene [I]*.

Ibid.

d. Following a hearing on remand to the agency, an Interior Department administrative law judge (ALJ) recommended that the Samish Tribe be acknowledged. See *Greene* v. *Babbitt*, 943 F. Supp. 1278, 1282 (W.D. Wash. 1996). The Assistant Secretary agreed in a final decision dated November 8, 1995. *Ibid.*; see 61 Fed. Reg. 15,825 (1996) (publication of final decision). The decision explicitly made "no determination as to what rights, if any, the [Samish Tribe] or its members may have pursuant to any treaty." *Id.* at 15,826.

5. More than five years later, the Samish Tribe filed the motion at issue here, in which it asserted that its acknowledgment as a Tribe was an "extraordinary circumstance" warranting relief from the judgment in *Washington II* under Federal Rule of Civil Procedure 60(b)(6). Samish asserted that its acknowledgment was

based on criteria similar to those applied by the Ninth Circuit in *Washington II* and would have affected the result had it occurred earlier.

a. The district court denied the motion on the ground that Rule 60(b)(6) generally is not available where no inadequacy or defect in the original proceeding is alleged. Pet. App. 58a. The court reasoned that the Samish had not been prevented "from adducing all evidence to support its claim to treaty fishing rights" in the *Washington II* litigation. *Ibid.* The court further concluded that relief was unwarranted because the Ninth Circuit's earlier rulings had established that federal acknowledgment served a legal purpose independent of treaty status and should not affect the finality of *Washington II*. *Id.* at 57a-58a.

b. The court of appeals reversed. Pet. App. 1a-41a. It held that Rule 60(b)(6) relief was appropriate because the Samish "were effectively prevented from proving their tribal status 'in a proper fashion'" in the *Washington II* litigation because of: "excessive delays and . . . misconduct" by the government in "withholding of recognition"; the government's "position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue"; and "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings of fact in *Washington II*." *Id.* at 16a (internal quotation marks omitted). The court of appeals further held that its earlier rulings distinguishing between treaty rights and federal recognition as an Indian Tribe had established only that recognition was unnecessary to establish treaty rights, not that it was *insufficient* to establish treaty rights. *Id.* at 12a, 16a-17a. In the court's

view, its precedents lead "to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights." *Id.* at 12a.

ARGUMENT

The United States agrees with petitioners that the result reached by the court of appeals is contrary to that court's previous decisions. This Court's review of the issues raised by the petition, however, does not appear warranted, at least at the present time.

1. When the Tulalip Tribe sought to intervene in *Greene I*, the court of appeals affirmed the denial of intervention on the ground that the determination whether the Samish qualify for federal recognition and the determination whether the Samish can exercise treaty rights present distinct issues. 996 F.2d at 976-977. The court explained that "the Samish may not gain fishing rights from federal recognition alone." *Id.* at 977. In *Greene II*, the court of appeals reiterated that the "recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." 64 F.3d at 1270. In the decision below, however, the court of appeals reasoned that "federal recognition is a sufficient condition for the exercise of treaty rights." Pet. App. 12a. That result is directly contrary to the court of appeals' previous decisions, and it calls into question the court's previous determination in those decisions that the litigation concerning the acknowledgment proceedings should go forward without the participation of the parties to *Washington I*.

The petitioner Tribes contend (Pet. 9-12) that their due process rights were denied when they were barred from intervening in the *Greene* litigation. The United States agrees that the decision below contradicts the

court of appeals' previous rulings and significantly undermines the holding of those previous decisions denying intervention. There nonetheless does not appear to be a compelling need for this Court's review at this time.

The court of appeals' decision addressed only the threshold question of whether there exist "extraordinary circumstances" permitting reopening of the *Washington II* judgment under Federal Rule of Civil Procedure 60(b)(6). The court of appeals' decision therefore did not itself affect the treaty Tribes' fishing rights or reallocate those rights. Accordingly, the court of appeals' decision does not effect a deprivation of property for purposes of petitioners' due process challenge. Furthermore, it would be quite novel to apply due process principles on behalf of other Tribes in the determination by Interior whether to recognize a group as a sovereign Tribe and thereby establish a government-to-government relationship with it. And the interaction of such recognition with litigation concerning treaty rights of other Tribes raises potentially complex issues that could render resolution of particular due process claims in that setting quite context-specific.[1]

In any remand, moreover, the district court must first consider Samish's compliance with the other limitations contained in Rule 60(b), including timeliness. The district court expressly declined to reach the question whether Samish's motion, which was filed more than five years after the Samish Tribe's federal recognition, was

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[1] The petitioner Tribes' due process claim assumes that Indian Tribes are "persons" for purposes of the Due Process Clause. Cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (States are not "persons" under the Due Process Clause); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 191-193 (1989) (Tribes are not "States" for purposes of the Interstate Commerce Clause).

filed "within a reasonable time." Fed. R. Civ. P. 60(b); see C.A. E.R. 19. Even assuming that the district court reopens the *Washington II* litigation, the treaty Tribes may assert a right to an opportunity to challenge Samish's claim to treaty successorship. See *Greene I*, 996 F.2d at 977 ("Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing rights. Federal recognition does not self-execute treaty rights claims."). But see Pet. App. 15a ("And although we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights, this is an inevitable conclusion."). In addition, the district court has yet to determine whether particular prior rulings concerning the allocation of treaty fishing rights and other matters could be revisited (and to what extent) in further proceedings, and what accommodations for respondent's asserted rights might be in order. See Samish Br. in Opp. 6 n.9, 7-8. Accordingly, there does not appear to be a compelling need for this Court's review at this time.

2. Petitioners correctly criticize (Pet. 12-19) the court of appeals' decision as a departure from the strict limitations on the availability of relief from a judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). "Extraordinary circumstances" sufficient to warrant relief from a judgment generally do not exist when the moving party could have presented its case in the previous proceeding. See *Ackermann* v. *United States*, 340 U.S. 193, 198-201 (1950). The court of appeals, however, allowed relief under Rule 60(b) even though respondent was not prevented from demonstrating its treaty rights in the *Washington II* litigation. See Pet. App. 27a (Bea, J., dissenting).

There nonetheless does not appear to be a need for this Court's review because the court of appeals' decision indicates that it does not establish a broad rule concerning the circumstances in which Rule 60(b)(6) relief is available. The decision instead reflects the court's conclusion that the unusual circumstances of this particular case warranted a case-specific departure from that principle that would normally govern relief under Rule 60(b)(6). In particular, the court acknowledged "that the Samish had the opportunity to litigate the factual basis underlying the tribe's treaty status in *Washington II*," Pet. App. 15a-16a, but the court nonetheless found "extraordinary circumstances" to exist based on what it considered to be "the government's excessive delays and . . . misconduct in withholding of recognition from the Samish," the "government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue," and "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings fact in *Washington II*." Pet. App. 16a (internal quotation marks omitted). Although we do not agree with the court of appeals that those considerations justify relief under Rule 60(b)(6), the court of appeals' application of Rule 60(b)(6) in those particular circumstances does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys

DECEMBER 2005

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NOV 1 - 2005

No. 05-445

In The

Supreme Court of the United States

THE LUMMI NATION, et al.,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

CRAIG J. DORSAY
Counsel of Record
2121 S.W. Broadway, Suite 100
Portland, OR 97201-3180
(503) 790-9060

Counsel for Respondent
Samish Indian Tribe

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent Samish Indian Nation[1] believes that petitioners have presented questions in their petition for certiorari that were not part of the case below and are not properly part of the case now. The Samish Indian Nation believes that the following questions frame the issues correctly, as those issues have actually been presented by petitioners.

1. Is congressionally delegated Executive Branch discretionary authority to determine whether an Indian entity should be recognized as an Indian tribe for purposes of the United States Constitution subject to limitation or judicial review under the political question doctrine other than as expressly provided for in federal acknowledgment procedures voluntarily adopted by the Executive Branch?

2. Is a fact-based, individual determination made pursuant to controlling United States Supreme Court and Ninth Circuit precedent under F.R.C.P. 60(b)(6) that extraordinary circumstances existed that effectively prevented a party from prosecution or defense of a previous action in proper fashion subject to review under other, inapplicable subsections of F.R.C.P. 60(b)?

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[1] The Samish Indian Tribe passed a revised tribal constitution in 2004 adapting the official name "Samish Indian Nation." Both this official name and the historic name of the Tribe, "Samish Indian Tribe," are used interchangeably.

LIST OF PARTIES TO THE PROCEEDING BELOW

The Samish Indian Tribe initiated sub-proceeding 01-2 before the District Court in *United States v. Washington*, Civ. No. 70-9213 (W.D.Wash.) by filing a motion to vacate a judgment against the Tribe under F.R.C.P. 60(b)(6). Twenty two Indian tribes with treaty status are presently parties in that proceeding. The United States of America and ten Indian tribes (Lummi Nation, Swinomish Indian Tribal Community, Skokomish Indian Tribe, Tulalip Tribes, Jamestown, Lower Elwha and Port Gamble Bands of S'Klallam Tribes, Puyallup Indian Tribe, Upper Skagit Tribe, and Suquamish Tribe) were active intervenors and participants in the District Court in opposition to the Samish Tribe's motion. The State of Washington took no position on the Samish 60(b)(6) motion. The United States and the same ten tribes filed briefs in opposition to the Samish Tribe's appeal to the United States Court of Appeals for the Ninth Circuit. The United States and nine tribes (Lummi, Swinomish, Tulalip, Jamestown, Port Gamble, Lower Elwha, Puyallup, Upper Skagit and Suquamish) filed petitions for rehearing and suggestion for rehearing en banc of the Ninth Circuit's January 5, 2005 decision in favor of the Samish Tribe. Two tribes, the Yakama Indian Nation and the Nisqually Tribe, filed amicus briefs in support of the petitions for rehearing and suggestion for rehearing en banc. Seven tribes (Tulalip, Lummi, Swinomish, Yakama, Upper Skagit, Port Gamble and Jamestown) filed the pending petition.[1]

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[1] One of petitioning tribes, the Yakama Indian Nation, participated only as amicus below and therefore is not qualified to file a petition for certiorari. *In re Leaf Tobacco Board*, 222 U.S. 578, 581 (1911).

RULE 29.6 STATEMENT

Respondent is a federally recognized Indian tribe that has no parents, and there are no publicly held companies that hold any stock of petitioner.

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BRIEF IN OPPOSITION

The Respondent, Samish Indian Tribe, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 394 F.3d 1152 (2005).

STATEMENT OF THE CASE

The decision of the Ninth Circuit Court of Appeals in *Samish Indian Tribe v. State of Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Samish Indian Tribe*") follows and is consistent with both prior precedent in *United States v. Washington*[2] and with the Ninth Circuit's previous Samish recognition related decisions.[3] There is no conflict between the *Samish Indian Tribe* decision and the decisions of other circuits regarding application and interpretation of F.R.C.P. 60(b)(6). The Ninth Circuit's application of this Rule to the unique factual circumstances of the Samish

[2] This brief will follow the nomenclature used by the Ninth Circuit in the *Samish Indian Tribe* decision to label the relevant *United States v. Washington* decisions. The original *U.S. v. Washington* decision, both district court and Ninth Circuit opinions, is referred to as "*Washington I*." 384 F.Supp. 312 (W.D.Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). *See Samish Indian Tribe*, 394 F.3d at 1154. The original district court decision denying treaty status to the Samish Indian Tribe in 1979 is referred to as "*Washington II*." 476 F.Supp. 1101 (W.D.Wash. 1979). *Samish Indian Tribe*, 394 F.3d at 1153. The Ninth Circuit's 1981 decision affirming the denial of Samish treaty status is referred to as "*Washington III*." 641 F.2d 1368 (9th Cir. 198[illegible] *Samish Indian Tribe*, 394 F.3d at 1155.

[3] There are two such decisions, *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene I*"), and *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) ("*Greene II*").

Indian Nation was both proper and consistent with the law.

This case involves the Ninth Circuit's conclusion that the Samish Indian Tribe must be allowed to join the twenty two (22) other Indian tribes that presently enjoy treaty status and who are parties in the ongoing *United States v. Washington* proceeding in the United States District Court for the Western District of Washington. Seven of these twenty two tribes object to the decision of the Ninth Circuit and have petitioned this Court for certiorari of the decision,[4] claiming that recognizing the treaty status of an additional signatory Indian tribe would "dilute" their treaty fishing allocations. *See Greene I*, *supra*, 996 F.2d at 976 ("[Tulalip Tribes] argue that their treaty fishing allocations are threatened by dilution."); *Greene II*, *supra*, 64 F.3d at 1270 ("The Tulalip Tribe has participated in this litigation because of concern that recognition of the Samish as a Tribe could lead to Samish eligibility for treaty fishing rights in already over-fished fisheries.").[5]

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[4] The United States was a party in opposition to the Samish Tribe in the District Court and Ninth Circuit but did not submit a petition for certiorari in the present case. Petitioners have suggested that the Court solicit the views of the United States on their petition, Petition for Certiorari, p. 19, but the decision not to appeal speaks for itself. As will be discussed below, the *Samish Indian Tribe* decision has no effect on federal interests; in fact, it preserves the federal government's plenary authority over Indian affairs.

[5] Before economic considerations took precedence, *see Greene I*, *supra*, 996 F.2d at 976 ("An economic stake in the outcome of the litigation, even if significant, is not enough."), some of the tribes now opposing the Samish Tribe supported Samish treaty status. *See, e.g.*, Jamestown Klallam Tribe, Tribal Council Resolution # 64-82, Sept. 20, 1982 ("Whereas, the Jamestown Klallam Indian Tribe recognizes the

(Continued on following page)

Two separate categories of Indian tribes descended from treaty signatories obtained treaty status in the original and in subsequent *United States v. Washington* decisions: tribes that were federally recognized were automatically granted treaty status[6] while unrecognized tribes had to prove that they had continuously maintained an organized tribal structure. *Samish Tribe, supra*, 394 F.3d at 1155; *Washington I, II,* and *III*. Federally

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Samish Indian Tribe as the historical and legal successors to the Samish Indian Tribe on a Government-to-Government basis;"); *United States v. Washington*, No. 79-4447, Ninth Circuit Court of Appeals, Brief of Plaintiff Suquamish Indian Tribe in Support of Plaintiff-Intervenor Samish Indian Tribe, Nov. 15, 1979, p. 12 ("The Samish Tribe was a party to the Treaty of Point Elliott. . . . The district court's decision as to the Samish tribe should be reversed.").

[6] The District Court used virtually identical language in *Washington I* to confirm treaty status for every recognized tribe that became a party in *United States v. Washington*:

> The ___ Tribe is the present-day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes and bands which were parties to the Treaty of _____. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the _____ Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476. Its membership is determined in accordance with its Constitution and bylaws approved by the Assistant Secretary of the Interior on _____, 19__. Its present membership roll was approved by a representative of the Secretary of the Interior on _____, 19__. The tribe presently has approximately ____ members.

See Washington I, 384 F.Supp. 312, 360 (Lummi); 379 (Upper Skagit); 380 (Yakama) (W.D. Wash. 1974); *United States v. Washington*, 459 F.Supp. 1020, 1039 (Swinomish); 1039 (Tulalip); 1039 (Port Gamble) (W.D. Wash. 1974-75). The only variation in this wording regarded federal approval of a tribe's constitution and membership roll, and which federal official granted such approval.

recognized tribes did not have to prove that they had continuously maintained an organized tribal structure; federal recognition (with descendancy from a treaty signatory) was in and of itself "sufficient" to make this showing. *Samish Indian Tribe*, 394 F.3d at 1157-59. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996) (federally recognized tribe that walked away from treaty grounds does not have treaty rights).

The Samish Indian Tribe was wrongfully dropped in 1969 from an internal list of Indian tribes kept and used by United States Department of the Interior employees to determine which Indian tribes were federally recognized. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1373-74 (Fed. Cir. 2005) ("*Samish Indian Nation*").[7] The Samish Tribe did not know at that time that its federal recognition had secretly been "lost," and in 1972 made the first of four requests to the Department of Interior for confirmation of its status as a federally recognized tribe. *Samish Indian Tribe*, *supra*, 394 F.3d at 1155 ("The Samish had first sought federal recognition in 1972, three years after a Bureau of Indian Affairs ("BIA") employee removed the Samish from a list used to determine whether a tribe was federally recognized."). When the Samish

[7] Both 2005 Samish Court of Appeals decisions are consistent on this issue. The Ninth Circuit in *Samish Indian Tribe* stated the logical outcome arising from these facts – that if the Samish Tribe had been federally recognized at the time it sought treaty status in *United States v. Washington*, the tribe "would almost certainly have won the right to exercise its treaty fishing rights." 394 F.3d at 1159. The Federal Circuit Court of Appeals in *Samish Indian Nation* held that the Samish Tribe was historically federally recognized and should have been federally recognized at the time Samish intervened in *United States v. Washington*. 419 F.3d at 1374.

Indian Tribe intervened in *United States v. Washington* in August 1974, the United States relied upon the list from which Samish had been dropped and took the position that the Samish Tribe was not federally recognized or entitled to that status. The Samish Tribe failed to prove at that time that it was entitled to exercise treaty rights under the legal standard applicable to unrecognized Indian tribes. *Washington II* and *III*, *cert. denied*, 454 U.S. 1143 (1982).

In both *Washington II* and *Washington III*, the United States, the United States District Court, and those tribes opposing Samish treaty status all suggested that future federal recognition of the Samish Tribe would probably warrant reexamination of the Samish Tribe's treaty fishing rights. *Samish Indian Tribe*, *supra*, 394 F.3d at 1155.[8] These promises were in substantial part the basis for the Ninth Circuit's decision that the Samish Tribe had shown extraordinary circumstances for purposes of Rule 60(b)(6) sufficient to vacate the judgment against the Samish Tribe in *Washington II*. *See Samish Indian Tribe*, *supra*, 394 F.3d at 1159.

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[8] The most explicit of these promises was made to this Court by the United States in its Brief for United States in Opposition to Petition for Writ of Certiorari, where the United States said: "should [the Samish] succeed in obtaining 'acknowledgment' of their current status as [an] 'Indian tribe[ ]' in the pending administrative proceedings, this might justify an application to re-open the present judgment against them." No. 81-509, p. 12, n.7. *Samish Indian Tribe*, *supra*, 394 F.3d at 1155 n.4. The United States represented that federal recognition of a tribe as the successor in interest to a treaty party "may well be controlling," under the political question doctrine and the deference that the federal courts must give the Executive Branch with regard to its dealings with Indian tribes. *Id.*; 394 F.3d at 1158 n.8.

The Samish Indian Tribe pursued federal recognition in light of the representations that had been made to the Tribe by the United States, the District Court, and some treaty tribes. *Samish Indian Tribe, supra*, 394 F.3d at 1155. The United States and the Indian tribes filing the present certiorari petition vigorously opposed Samish's recognition application. *Id.*, at 1156; *Greene I, supra*. After seventeen years of litigation, the Samish Tribe finally achieved full federal recognition in November 1996 – with reinstatement of factual findings wrongfully removed by the Assistant Secretary for Indian Affairs after ex parte meetings with federal advocates. The Tulalip and other tribes sought to intervene in the Samish recognition proceeding on the ground that Samish recognition might affect their treaty rights. *Greene I, supra*, 996 F.2d at 975-76. The District Court and Ninth Circuit ruled that Tulalip and the other tribes "ha[d] no protectable interest" that would entitle them to intervene on the issue of Samish recognition. *Id.* at 978.[9]

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[9] Contrary to the assertion made in the certiorari petition, Petition, p. 10, the Ninth Circuit has never ruled that the Tulalip and other opposition tribes would have the right to intervene in the Samish recognition proceeding if they could show their treaty rights would be impacted; the Ninth Circuit in *Greene I* expressly rejected this argument. 996 F.2d at 976-978. As the Ninth Circuit observed several times, Tulalip and other opposition tribes **would** have an opportunity to weigh in on Samish treaty status outside the Samish recognition proceeding because Samish could challenge the prior treaty judgment against it only in the ongoing *United States v. Washington* proceeding, and the other tribes were already parties to that proceeding. *Id.* Samish undertook such a direct challenge in *United States v. Washington* by filing its Rule 60(b)(6) motion. Opposition tribes will also have an opportunity to argue their interests once Samish files to intervene in *United States v. Washington* to exercise its treaty rights.

After achieving formal federal recognition and reorganizing its tribal government, the Samish Tribe asked the United States to bring an action on the Tribe's behalf to reopen the judgment against the Samish Tribe in *United States v. Washington*. The Department of Interior and Department of Justice took three years to deny the Samish Tribe's request, upon which the Samish Tribe became eligible for discretionary attorney fee funding under 25 C.F.R. § 89.41. Soon after obtaining this funding, the Samish Tribe petitioned the District Court in *United States v. Washington* to vacate the judgment against the Tribe pursuant to F.R.C.P. 60(b)(6).

The District Court denied the Samish Tribe's motion on the basis that federal recognition was irrelevant to the issue of treaty status and because of finality concerns. The Ninth Circuit reversed, concluding that findings of fact underlying the Samish Tribe's federal recognition, the United States' express promise to revisit Samish treaty status upon successful federal recognition, and other extraordinary circumstances had prevented the Tribe from proving its tribal status in proper fashion. 394 F.3d at 1159. The Ninth Circuit held that these extraordinary circumstances justified reopening the judgment against the Samish Tribe in *Washington II*.

Contrary to assertions made in the petition for certiorari, the Ninth Circuit's decision in *Samish Indian Tribe* is fully consistent with prior decisions of this Court, decisions of the Ninth Circuit, and decisions of other Circuits. This case involves subsection (6) of Rule 60(b) and does not implicate other subsections of that Rule. The decision will not upset settled decisions in *United States v. Washington*. When the Samish Tribe obtains treaty status after a hearing on remand of this case, the District Court will

then have authority to re-allocate the tribal harvest share and other details of actual exercise of Samish treaty rights, applying equitable considerations. *United States v. Washington*, 157 F.3d 630, 652-55 (9th Cir. 1998) (allocation of treaty harvest subject to equitable considerations and balancing of interests of parties); *Greene I, supra*, 996 F.2d at 977("['*Washington I* district court'] is the forum that will resolve ultimately any attempt to reallocate treaty fishing rights and that is the forum where Tulalip *and all other interested parties* can have their say." (emphasis in original)). Speculative consideration of possible dilution of tribal harvest share is premature before this Court.

In its two earlier Samish decisions, the Ninth Circuit made it clear beyond dispute that a Rule 60(b)(6) challenge to the 1979 judgment against Samish treaty status was "inevitable" if the Samish Tribe prevailed in the then unlikely possibility[10] of achieving federal recognition. *E.g.*, *Greene I, supra*, 996 F.2d at 977 ("The [Tulalip] Tribe is no doubt correct that should the Samish prevail before the BIA and gain recognition, the next step would be to assert fishing rights as well."); 978 ("a direct challenge to the allocation of treaty fishing rights . . . may be inevitable"). Petitioners have not presented an accurate picture of how Samish treaty rights were raised in the Samish recognition proceedings.

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[10] The Bureau of Indian Affairs had denied the Samish Tribe's petition for federal acknowledgment under the Federal Acknowledgment Regulations in 1982 and 1987, in proceedings later found by the District Court and Ninth Circuit to have violated the due process rights of the Samish Tribe. *See Samish Indian Tribe, supra*, 394 F.3d at 1155-56; *Greene II, supra*, 64 F.3d at 1269 (history of Samish recognition petitions), 1271-1274 (Samish had property interest entitled to due process before cutoff of benefits); 25 C.F.R. Part 83.

Both the district court and Ninth Circuit correctly ruled that **for purposes of the Samish recognition proceeding**, the judgment against Samish in *Washington II* was res judicata. *See* Petition for Certiorari, pp. 5-6. The courts did not say that Samish treaty status could never be reconsidered under any circumstances or in any forum; the courts said only that Samish treaty status could not be relitigated in the Samish recognition proceedings and that Samish could not use its treaty status as a ground to achieve federal recognition. *Greene I*, *supra*, 996 F.2d at 977 ("the Samish need not assert treaty fishing rights to gain federal recognition"); *Greene v. Lujan*, No. C89-645Z (W.D.Wash.), Order dated Feb. 25, 1992, 1992 WL 533059 (unreported). What the Ninth Circuit and District Court did say on the issue of relitigating Samish treaty status was that any Samish challenge to the judgment against Samish in *Washington II* and *III* must take place in the ongoing *United States v. Washington* proceeding. *E.g.*, *Greene I*, *supra*, 996 F.2d at 977-78.

In *Samish Indian Tribe*, the Ninth Circuit examined the findings of fact underlying Samish administrative recognition by the United States – made pursuant to the federal acknowledgment criteria in 25 C.F.R. Part 83 – and concluded that in achieving recognition Samish also met the standard necessary to exercise treaty rights. 394 F.3d at 1158. The Court of Appeals then examined its precedent and found that it had never concluded that federal recognition is irrelevant to a tribe's exercise of treaty rights. *Id.* The Ninth Circuit found that it "ha[d] never held that federal recognition is not a *sufficient* condition for the exercise of ['treaty fishing'] rights." *Id.* (Emphasis in original). The Ninth Circuit then concluded: "Although we have never explicitly held that federal recognition

necessarily entitles a signatory tribe to exercise treaty rights, this is an inevitable conclusion." *Id.* at 1159. Integrating its prior precedents with the findings of fact made in the Samish recognition proceeding that the Samish Tribe was a party to the Treaty of Point Elliott, has been continuously identified throughout history as Indian and has existed as a distinct community maintaining political influence within itself as an autonomous entity since first sustained European contact, the Ninth Circuit ruled: "As the Samish are a signatory tribe and have proved the single necessary and sufficient condition for the exercise of treaty rights, the res judicata effect of *Washington II* is all that is keeping the Samish from pursuing its treaty rights." 394 F.3d at 1160.

As this language reflects, the *Samish Indian Tribe* decision does not dispense with the res judicata effect of the Samish judgment in *Washington II*. The Ninth Circuit in *Samish Indian Tribe* decided, based on facts in the Samish recognition proceeding and extraordinary circumstances, that standards established under Rule 60(b)(6) require that the judgment in *Washington II* be set aside and that the Samish Tribe be allowed to revisit the issue of its treaty status in *United States v. Washington*. The Court held that the Samish Tribe was effectively prevented from proving its tribal status in *Washington II* in proper fashion because of the

> government's "excessive delays and . . . misconduct" in withholding recognition from the Samish, a circumstance beyond their control; the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue; and the district court's erroneous conclusion that nonrecognition was

> decisive and wholesale adoption of the United States' boiler-plate findings of fact in *Washington II*. . . .

394 F.3d at 1159. The Samish Tribe met the standards established by Rule 60(b)(6) under these facts because "federal recognition is determinative of the issue of tribal organization, the issue upon which the Samish were denied treaty rights in *Washington II*": "As the Samish's lack of recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*." 394 F.3d at 1159, 1161.[11]

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[11] This finding that the Samish Tribe was effectively prevented by the federal government from challenging denial of federal recognition was recently confirmed by the Federal Circuit Court of Appeals in a separate proceeding. *Samish Indian Nation*, *supra*, 419 F.3d at 1373 ("Because tribal recognition remains a political question, the trial court erred in holding that Samish 'could have pursued the present action in court before the administrative proceedings [concerning the Samish petition for federal acknowledgment] were concluded. . . . [T]he Samish cause of action for retroactive benefits did not accrue until they obtained a final determination from the district court, through their APA challenge, that the government's conduct underlying its refusal to accord federal recognition, before 1996, was arbitrary and capricious." The Federal Circuit concluded that the Samish Tribe should always have been federally recognized, *Id.* at 1373, citing the District Court's decision: "[T]he district court finally established that the government wrongfully withheld the Samish federal acknowledgment and disregarded facts that would have supported historic recognition. . . . [T]hose findings support the Samish contention that but for the government's arbitrary and capricious treatment the Samish would have been extended federal recognition prior to 1996." *Id.* at 1374 (citing *Greene v. Babbitt*, 943 F.Supp. 1278 (W.D.Wash. 1996) ("*Greene III*")). As the Ninth Circuit noted in *Samish Indian Tribe*, "The Samish would almost certainly have won the right to exercise its treaty fishing rights had the tribe been federally recognized at the time of *Washington II*. 394 F.3d at 1159.

REASONS WHY PETITIONERS' PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. The Ninth Circuit's Ruling Did Not Deny Petitioners Due Process Of Law.

Petitioners argue that the District Court's rejection in 1989 and 1992 and the Ninth Circuit's rejection in 1995 of the Tulalip Tribes' attempt to intervene and participate in the Samish administrative recognition proceeding pursuant to 25 C.F.R. Part 83 denied it and other similarly situated tribes due process. Petition for Certiorari, pp. 9-12. Petitioners' argument is based upon the erroneous belief that the District Court and Ninth Circuit told the Tulalip Tribes that the Samish Tribe would never be able to revisit its treaty rights even if it successfully achieved federal recognition. As discussed above in the Statement of the Case, this belief is patently wrong. No such promise was ever made; in fact, the Ninth Circuit several times stated the opposite – a challenge by the Samish to the judgment in *Washington II* was inevitable if the Samish Tribe successfully achieved federal recognition.

To have a due process right, a party must have a "significantly protectable interest." *Greene I*, *supra*, 996 F.2d at 976 (citing *Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989)).[12]

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[12] Petitioners assert on page 11 of their petition that any party "affected" by government action must be given due process, citing *California v. FERC*, 329 F.3d 700, 708 n.6 (9th Cir. 2003). That is not what that decision actually says. Earlier in the decision the court stated that a party must have a "legally protected interest" to qualify for constitutional due process, 329 F.3d at 707, and the Court assumed for purposes of the case, without deciding the issue, that the party in question had been deprived of a liberty or property interest. *Id.*, n.3.

Both the District Court and the Ninth Circuit during the appeal of the 1987 BIA administrative decision denying the Samish Tribe federal recognition held that the Tulalip Tribes had no protectable interest on the issue of Samish recognition. *Greene I*, *supra*, 996 F.2d at 978; *see Greene v. Lujan*, No. C89-645Z, Transcript of Hearing on Tulalip Motion to Intervene, Oct. 12, 1989, p. 15 (quoted in Samish Indian Tribe's Answer to Petitions for Rehearing and Rehearing En Banc, and Amicus Briefs, No. 03-35145, United States Court of Appeals for the Ninth Circuit, April 25, 2005, p. 6).

Contrary to petitioners' arguments, Petition for Certiorari, p. 10, the Ninth Circuit has never acknowledged or held that the Tulalip Tribes would have had a right to intervene in the Samish recognition proceeding if Samish recognition had an impact on Samish treaty status. The Ninth Circuit did not find in either *Greene I* or *II* that the Tulalip Tribes had a significantly protectable interest justifying intervention in the Samish recognition proceeding under any scenario. The only statement the Ninth Circuit did make in any way related to this issue was to note that **if** a party's protected interest will be impaired, then that party has been allowed to intervene. *Greene I*, *supra*, 996 F.2d at 977. The Court then went on to hold, however, only that any interest the Tulalip might have on the issue (without any ruling that they did have an interest) could be raised in any action the Samish brought in *United States v. Washington* if the Samish

Tribe decided to relitigate its treaty fishing rights once it successfully achieved federal recognition. *Id.* at 977-78.[13]

To recognize petitioners' due process arguments would significantly undermine federal "exclusive" or "plenary" authority over Indian affairs. *See Seminole Indian Tribe v. State of Florida*, 517 U.S. 44, 62 (1996); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). Even more significantly, it would overturn a long-standing, critical conclusion of law in *Washington I*. Petitioners, not the Samish Indian Tribe, would throw settled law into question. *See* Petition for Certiorari, p. 3.

Federal recognition of Indian tribes is a political question committed exclusively to the Executive and Legislative Branches. It is generally not subject to judicial review.[14] The federal courts are required to defer to the political branches' determination that a group of Indians constitutes a tribe. *Samish Indian Tribe, supra*, 394 F.3d at 1158. As Judge Boldt ruled in *Washington I*:

> The recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government.

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[13] The court also identified the Tulalips' only interest as a possible dilution of its treaty fishing allocation, *id.* at 976, and held that an economic stake in the harvest of fish, even if significant, is not a significantly protectable interest for due process purposes. *Id.*

[14] This issue is discussed at great length in the *Samish Indian Nation* decision at 419 F.3d at 1369-1373. For example: "As a political determination, tribal recognition is not justiciable." 419 F.3d at 1370 (citing *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865)).

384 F.Supp. 312, 400 (Conclusion of Law # 9). Other Indian tribes or parties have no legal right to infringe upon this Executive Branch authority.[15] Even when the Executive Branch has "canalized" the previous discretion of its officials through federal acknowledgment regulations establishing an acknowledgment process, *Miami Nation of Indians v. Dept. of Interior*, 255 F.3d 342, 348 (7th Cir. 2001), Executive Branch recognition authority essentially remains a non-justiciable political decision. *Samish Indian Nation*, 419 F.3d at 1370-73.

In the Samish recognition proceeding, the federal government found that the Samish Tribe is the political successor in interest to the historical Samish Tribe that was a signatory to the Treaty of Point Elliott. *Samish Indian Tribe*, 394 F.3d at 1159-1161; *see Greene II*, 64 F.3d at 1270 ("the Tulalip Tribe emphasizes that in the petition for recognition, the Samish Tribe has not claimed to be any tribe other than the historical Samish Tribe that was party to the Treaty of Point Elliott. To the extent that the Samish rely upon historical roots in this litigation, the roots are probably the same as those they posited in *Washington II*"); *see Samish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 169, 172 (1958) ("We conclude that petitioner, which alleges it is a tribal organization

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[15] This conclusion applies to a federal decision to enter into a treaty with an Indian tribe as well as Executive Branch administrative recognition of a tribe. As the Federal Circuit noted in the *Samish Indian Nation* decision, "[t]here are generally three means by which the federal government can recognize an Indian tribe." 419 F.3d at 1369-70; *see* F. Cohen, Handbook of Federal Indian Law 5-6 (1982 ed.). Two of the three methods referred to are by treaty or by executive branch action taken pursuant to authority delegated by Congress. *Id.* There is no judicial review of the treaty authority under the U.S. Constitution that is relevant to this case.

recognized by the Secretary of Interior of the United States, has shown itself to be the descendants and successors in interest of the Samish Indians of aboriginal times."). The Tulalip Tribes claimed they had a right to intervene in the Samish administrative recognition proceedings under F.R.C.P. 24, because of the alleged impact Samish recognition might have on it. *See Greene I*, *supra*, 996 F.2d at 976-78. The Federal Rules of Civil Procedure, however, do not grant substantive rights to a party. *See Chemehuevi Indian Tribe v. Cal. St. Bd. of Equal.*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985) (statute authorizing Federal Rules of Civil Procedure, 28 U.S.C. § 2072, specifies that the rules "shall not abridge, enlarge or modify any substantive right").

The federal acknowledgment regulations do not grant the Tulalip Tribes or any other party the right to challenge the federal government's decision to recognize an Indian tribe. 25 C.F.R. Part 83. The regulations allow only a limited right of participation by "interested parties." *E.g.*, 25 C.F.R. § 83.1 (definition of interested party); 25 C.F.R. § 83.11 (right of interested party to request reconsideration of recognition decision). The only judicial review available under the APA to review a federal acknowledgment decision for an Indian tribe is to "ensure that the government followed its regulations and accorded due process." *Samish Indian Nation*, *supra*, 419 F.3d at 1373 (citing *Miami Nation*, *supra*, 255 F.3d at 348). In all other aspects, the federal government's decision to recognize an Indian tribe remains a political act. *Id.*

While petitioners claim that their due process rights were violated in the Samish recognition proceedings, they have never shown in what manner their rights were

actually injured or how they were denied from participating in or presenting any evidence or arguments in opposition to Samish recognition. The Tulalip and other tribes participated in the Samish recognition proceeding as interested parties. *Greene I*, 996 F.2d at 975. They participated as amicus parties in the remanded recognition hearing. *Id.*, 996 F.2d at 976, 978. The Tulalip Tribes submitted numerous briefs on every conceivable issue in those proceedings. The United States actively opposed Samish recognition and vigorously litigated the issue on behalf of other tribes; petitioners have never demonstrated how the United States' representation in that proceeding was deficient or did not represent their interests. As just one example, the United States presented several representatives of the Swinomish Indian Tribal Community, one of the petitioning tribes here, as witnesses against Samish recognition. *See* Memorandum in Support of Samish Indian Nation's FRCP 60(b)(6) Motion to Reopen Judgment, (W.D.Wash.), No. 70-9213, Sub-proceeding 01-2, CR 44, Ex. 6, p. 15, Recommended Decision on Samish Recognition, United States Dept. of Interior, Office of Hearings and Appeals, Aug. 31, 1995. Petitioners' due process arguments are theoretical; they are not grounds for granting certiorari.

Petitioners' due process arguments also carry no weight with regard to equitable allocation of the treaty fish harvest among tribes. Equitable considerations are not available to defeat or interpret the treaty rights of a tribe. *United States v. Washington*, 157 F.3d 630, 649-50 (9th Cir. 1998). In *Washington I* the District Court held that the tribes with fishing rights under the various Puget Sound treaties had a right to 50 percent of the harvestable fish passing through their traditional off-reservation

fishing grounds. *Samish Indian Tribe, supra*, 394 F.3d at 1154. No property right to any specific number or percentage of fish has been decided in *United States v. Washington*:[16]

> [T]he Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights (citation omitted). The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. *Geer [v. Connecticut]*, 161 U.S. 519, 529 (1896). Rather, the court decreed an allocation of the opportunity to obtain possession of a portion of the run.

Washington I, 520 F.2d at 687. The allocation of harvest and other details of actual exercise of Samish treaty rights are subject to equitable considerations, balancing the interests of the parties. *United States v. Washington, supra*, 157 F.3d at 652-55.

The other treaty tribes, as set forth in the *Greene* decisions, will have the right to state their positions on equitable allocation of a portion of the harvest to Samish in *United States v. Washington* once the Samish Tribe obtains treaty status. Petitioning tribes do not have and had no property interest sufficient to allow them to separately

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[16] *See Menominee Indian Tribe v. United States*, 391 U.S. 404 (1968), which stated that hunting and fishing rights can constitute a property right. Petitioners here claim a property right interest, but *Menominee* did not determine the "precise nature and extent of those hunting and fishing rights" in that case, 391 U.S. at 407, and did not rule that there was a property right in the allocation of an overall Indian treaty harvest right among all treaty tribes.

challenge Samish recognition. The opportunity to challenge Samish treaty harvest allocation is apparent from ongoing sub-proceedings in *United States v. Washington*; adjustment to treaty harvest allocations and challenges to tribal shares of treaty harvest are ongoing, without assertion by a tribe that due process property rights have been violated. *See, e.g.*, Sub-proceeding No. 91-1 (Halibut fishery, Order dated May 3, 2005, Docket 17954, Order declining to adopt interim halibut management plan); Sub-proceedings 05-1 and 05-02 (Skokomish dispute with regard to Hood Canal fishery allocation plan); Sub-proceedings 05-3 and 05-4 (challenges by petitioners Tulalip, Upper Skagit, and Swinomish to Suquamish usual and accustomed fishing grounds and stations). The Court should deny the petition for certiorari.

B. The Ninth Circuit's Decision On Rule 60(B)(6) Issues Is Consistent With Precedent And Does Not Create A Conflict With Other Circuits.

The Ninth Circuit's decision involved only subsection (6) of Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment." Contrary to assertions of petitioners, this case does not and has never involved subsections (1) or (3) of Rule 60(b). Petitioners' attempt to strain the language of Rule 60(b) to implicate subsections (1) and (3) in this case are completely without merit.

The Ninth Circuit applied the Rule 60(b)(6) precedents of this Court and of the Ninth Circuit under Rule 60(b)(6) in *Samish Indian Tribe* to reach a fact based conclusion that extraordinary circumstances existed under

the Rule sufficient to require that the judgment against the Samish Tribe in *Washington II* be vacated: "As the Samish's recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*." 394 F.2d at 1161. *See id.* at 1159. The Court of Appeals relied on two of its Rule 60(b)(6) decisions for this conclusion, *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047 (9th Cir. 1993), and *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002), both of which applied Rule 60(b)(6) standards established by this Court in *Klapprott v. United States*, 335 U.S. 601 (1949); *Ackermann v. United States*, 340 U.S. 193 (1950), and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

The present case does not involve a change of law as petitioners assert. The Ninth Circuit followed its own precedent and the precedent of other Circuits in ruling in favor of the Samish Indian Tribe. Subsection (3) of Rule 60(b) does not apply to the specific factual extraordinary circumstances relied upon by the Ninth Circuit to grant Rule 60(b)(6) relief in this case. Petitioners do not even allege that Rule 60(b)(6) was mis-applied in this case or that the Ninth Circuit violated precedent under the Rule in its decision.[17] There is no conflict in the case law or between the Circuits under Rule 60(b)(6) and the Court should deny certiorari in the present case.

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[17] Supreme Court Rule 10 states that petitions for a writ of certiorari are disfavored when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted on behalf of the Samish Indian Tribe this 7th day of November, 2005.

Craig J. Dorsay
Counsel of Record
2121 S.W. Broadway, Suite 100
Portland, OR 97201-3180
(503) 790-9060

Counsel for Respondent
Samish Indian Tribe

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IN THE

Supreme Court of the United States

THE LUMMI NATION, *et al.*,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Counsel for Petitioner
The Tulalip Tribes

(Additional Counsel listed on signature page)

198546

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RULE 29.6 STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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INTRODUCTION

The United States agrees that the decision below conflicts with and undermines prior precedent. However, the United States ignores its corrosive effect on Fed. R. Civ. P. 60(b)(6) jurisprudence and the case load of the judiciary. The United States portrays the Ninth Circuit opinion as narrow in its implications, and concludes that the decision is unworthy of this Court's review.[1] The United States is able to reach that conclusion only by (1) ignoring all of the conflicts the Ninth Circuit has created with sister Circuits, *Petition for Certiorari* at 12-18, and (2) failing to discuss any of the other concerns raised by Petitioners in their Petition.[2] By offering no rebuttal, the United States admits that the decision below is inconsistent with Rule 60(b) cases from this Court[3] and from the sister Circuits.[4]

Samish likewise does not attempt to rebut the argument that the Ninth Circuit's decision is directly contrary to well-established law of this Court and the Circuits. Instead, Samish puts on the cloak of victimhood and asks the Court to relieve it of the consequences of its deliberate, intentional choice in 1975 to proceed with treaty rights litigation without first obtaining federal recognition. In so doing, it raises new issues and refers to "evidence" not contained in the record. Allowing Samish to re-open the 1979 decision, *United States v. Washington*, 476 F. Supp. 1101, (W.D. Wash. 1979) would violate a large body of Rule 60(b) law.

1. The Ninth Circuit Ruling Has National Significance.

The federal district courts have already noticed the Ninth Circuit decision, and relied on it to expand the grounds for relief under Rule 60(b)(6). For example, in one of the myriad

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1. The United States iterates its argument no less than four times. The United States doth protest too much. Repetition does not strengthen a weak argument.

2. These concerns include the Ninth Circuit's denial of due process, *Petition for Certiorari* at 9-12 and the Ninth Circuit's expansion of "misconduct" covered by Rule 60(b), *id.* at 19.

3. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

4. *See, e.g.*, cases cited at pages 12, 14, 15, & 17 of *Petition for Certiorari*.

parts of the Exxon Valdez case, the Alaska District Court cited the Ninth Circuit decision on review here, and then went on to rule that a claimant would be allowed to reopen his fishing claim because his attorney failed to inform him that the claim had been dismissed. *In re the Exxon Valdez*, __ F. Supp. 2d __, 2005 WL 2340703 at *4 (D. Alaska September 22, 2005). The court allowed a reopening on the basis that the claimant personally did not know that his fishing claims had been dismissed even though his lawyer was aware that of the dismissal. *Id.*

This ruling is inconsistent with well-settled law from other circuits holding that the client's sole remedy in such a case is legal malpractice action against his attorney. *Daniels v. Brennan*, 887 F.2d 783, 788 (7th Cir. 1989), *quoting Pryor v. United States Postal Service*, 769 F.2d 281, 288-89 (5th Cir. 1985) (allowing reopening each time a party alleged "hardships" due to a negligent attorney would cause the "meaningful finality of judgment" to "largely disappear").

Thus, the Ninth Circuit's ruling has already yielded results contrary to settled law of this Court and other circuits. It also creates the potential for reopening prior rulings in the multitude of complex, multiparty cases in which federal courts across the nation retain continuing jurisdiction. *See, e.g., Ayers v. Fordice*, 111 F.3d 1183 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998) (jurisdiction over remedial decree entered in class action alleging racially dual system of public higher education); *Floyd v. Ortiz*, 300 F.3d 1223 (10th Cir. 2002) (jurisdiction to administer consent decree in action by inmates against Colorado Department of Corrections contesting DOC's handling of prison canteen funds); *Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746 (4th Cir. 2003) (jurisdiction over consent decree entered in class action by auto dealers); *United States v. State of Tennessee*, 143 Fed. Appx. 656 (6th Cir. 2005) (unpublished decision) (jurisdiction over Remedial Order and Community Plan entered in action alleging that State of Tennessee failed to provide humane conditions to mental retarded residents of state-operated care facility); *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004) (jurisdiction over consent decrees entered in class action by indigent minors

diagnosed with severe emotional and mental disabilities who were being housed in state facilities with adults including sexual predators); *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233 (3rd Cir. 2005) (jurisdiction over administration and enforcement of consent decree entered in class action by public housing tenants because of housing authority's failure to properly factor gas rates into gas allowances).

2. This proceeding does *not* challenge the Department of the Interior's decision to grant federal recognition to Samish.

Samish devotes much of its Brief in Opposition to explaining that federal recognition is a "political question" and that the federal government's decision to grant federal recognition to Samish cannot be challenged in this appeal. *Brief in Opposition to Certiorari* at 14-16. This discussion is interesting, but completely irrelevant, because the Petitioning Tribes are NOT challenging Interior's decision in this proceeding.[5] The Petitioning Tribes are challenging the Ninth Circuit's decision to ignore well-established finality rules and allow Samish to resurrect its attempt to relitigate its entitlement to treaty fishing rights.

Samish attempts to characterize this case as an Indian law case with limited applications in other contexts, but it is not. This is a procedural case aimed at preserving the important role that Federal Rule of Civil Procedure 60(b) plays in furthering the essential interests served by *res judicata* and other finality doctrines. The Ninth Circuit's decision in this matter, particularly its decision finding extraordinary circumstances in *this* case based on alleged misconduct that occurred in a *different* case twenty years earlier, has implications far beyond the relatively small Indian law world.

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5. The only danger to Samish's administrative recognition is if the current Ninth Circuit decision stands. A rationale similar to that which allows Samish the opportunity to reopen its Treaty status case applies with equal force to allow Tulalip and the other interested Tribes to seek to reopen the Samish recognition proceeding.

3. Motions to reopen judgments necessarily implicate finality concerns.

Samish claims that the Ninth Circuit decision does not implicate finality concerns:

> [T]he *Samish Indian Tribe* decision does not dispense with the *res judicata* effect of the Samish judgment in *Washington II*. The Ninth Circuit in *Samish Indian Tribe* decided . . . that the Samish Tribe [should] be allowed to revisit the issue of its treaty status in *United States v. Washington*.

Samish Brief in Opposition at 10. Samish apparently does not understand that being allowed to "revisit" a previously decided issue is exactly what the doctrine of *res judicata* is designed to prevent:

> When a litigant files a lawsuit, the courts have a right to presume that he has done his legal and factual homework. It would undermine the basic policies protected by the doctrine of res judicata to permit the [plaintiffs] to once again avail themselves of judicial time and energy while another litigant, who has yet to be heard even once, waits in line behind them.

Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 596 (7th Cir. 1986). The purpose of *res judicata* is to ensure "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931).

4. Protected property interests of Tulalip and the other Petitioning Tribes have been adversely affected by the Ninth Circuit's decision threatening their treaty rights based on a proceeding in which the Petitioner Tribes were not allowed to participate.

Tribal fishing rights secured by Treaty with the United States are a "property right" protected by the Due Process Clause of the Fifth Amendment. *Menominee Indian Tribe v. United States*, 391 U.S. 404, 413 (1968). Thus, a Tribe who shares

the property right would be allowed to intervene in any action where a new group of Indians sought to dilute its share. But Samish persuaded the Ninth Circuit that their recognition would not threaten Tulalip fishing rights, *Greene v. United States*, 966 F.2d 973 (9th Cir. 1993):

> The Tulalip concede that the district court limited the Samish claims to federal recognition. Thus, adjudication of the Samish treaty fishing rights is not an issue in the pending proceeding. Nevertheless, the Tulalip argue that renewed administrative inquiry into the Samish tribal status will raise nearly identical questions. They assert that the BIA will review much of the same factual record that served as the basis for the judicial allocation of fishing rights.
>
> . . .
>
> We recognize that the two inquiries are similar. Yet each determination serves a different legal purpose and has an independent legal effect. Federal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott.
>
> . . .
>
> Similarly, the Samish need not assert treaty fishing rights to gain federal recognition. . . . Even if they obtain federal tribal status, the Samish would still have to confront the decisions in Washington I and II before they could claim fishing rights. ***Federal recognition does not self-execute treaty rights claims.***

Greene I, 996 F.2d at 976-77 (*emphasis added*).

Having prevailed on that argument, which prevented the Tribes from participating in the recognition proceedings to protect their interests, Samish now claims that its recognition should allow it to do exactly what the Ninth Circuit said it could not, *i.e.*, allow Samish to reopen the Treaty fishing rights decisions. Samish's position directly contradicts the Ninth Circuit's observation that

> [T]he Tulalip assert an interest in defending *Washington II*[6] from collateral attack by way of an administrative hearing. This interest is immaterial because the district court explicitly ruled that the Samish may not use the reopened hearing to attack the *Boldt* decision.

Greene I, 996 F.2d at 977.

Samish also claims that due process was not denied because Tulalip was permitted to participate in the recognition proceedings as *amicus curiae*. *Samish Opposition Brief* at 16-17. However, as Samish surely knows, an *amicus curiae* is not a party to litigation. *Miller-Wohl Co., Inc. v. Comm'n of Labor and Industry*, 694 F.2d 203 (9th. Cir. 1982), *citing Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir.1953). *Amici* have

> been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion. *Moten v. Bricklayers, Masons and Plasterers Int'l Union of Am.*, 543 F.2d 224, 227 (D.C. Cir. 1976) (per curiam) (amicus may not appeal judgments); *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 300 So.2d 106, 111 (1974) (per curiam) (amicus is not a party and cannot assume the functions of a party nor control litigation); *Silverberg v. Industrial Comm'n*, 24 Wis. 2d 144, 128 N.W.2d 674, 680 (1964) (amicus brief seeking to challenge validity of testimony in the record stricken because attempt to challenge was not a proper function of amicus); 4 Am.Jur.2d, Am.Cur. §§ 3, 6 at 111, 114. *See City of Winter Haven v.* Gillespie, 84 F.2d 285 (5th Cir. 1936), *cert. denied*, 299 U.S. 606, 57 S.Ct. 232, 81 L. Ed. 447 (1936).

United States v. State of Michigan, 940 F.2d 143, 165 (6th Cir. 1991). An *amicus* cannot initiate, create, extend, or enlarge issues. *United States v. Alkaabi*, 223 F. Supp. 2d 583, 593 n.19

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6. *United States v. Washington*, 476 F. Supp. 1101 (W.D.Wash.1979), *aff'd*, 641 F.2d 1368 (9th Cir.1981), *cert. denied*, 454 U.S. 1143 (1982).

(D.N.J. 2002), *citing Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa.1995), and *Wyatt By and Through Rawlins v. Hanan*, 868 F. Supp. 1356, 1358-59 (M.D. Ala. 1994). Only a named party or an intervening real party in interest is entitled to litigate on the merits. *United States v. Michigan*, 940 F.2d at 165-66, *citing Miller-Wohl*, 694 F.2d at 204; *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); and *Gilbert v. Johnson*, 601 F.2d 761, 768 (5th Cir. 1979) (Rubin, J., concurring).

In short, participation as *amicus* was a wholly inadequate way for Tulalip to protect its rights, because Tulalip was not permitted to cross-examine or impeach Samish's witnesses, to offer its own impeaching and other evidence, or to raise new issues. Tulalip and the other Petitioning Tribes including Swinomish, who also tried to intervene in the Samish proceeding, have interests different from and adverse to Samish, in contrast to the BIA.[7] Had intervention been permitted, there may well have been a different outcome in the recognition proceeding. The only way for Tulalip and other tribes to obtain standing to litigate on the same basis as that exercised by the named parties was by intervention. *See United States v. Michigan*, 940 F.2d at 166 (only a named or intervening party is entitled to litigate on the merits).

Samish also claims that the Petitioning Tribes' due process claims significantly undermine federal "exclusive" or "plenary" authority over Indian affairs, because allowing the due process claim would result in re-opening the ***administrative recognition*** proceeding. But the only issue ***here*** is whether Samish is entitled to seek relief from the earlier judgments under Rule 60(b)(6) because of the alleged extraordinary circumstances attendant to its recent federal recognition. Samish cannot have it both ways: either the administrative recognition has no bearing on treaty tribe

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7. Another of the Petitioner Tribes, Swinomish, sought to intervene in the administrative proceedings on Samish recognition that resulted from the *Greene* case. The ALJ denied intervention based upon the *Greene* decisions. *See* 61 Fed. Reg. 15825-01, 15827 (1996).

status, as it argued and the Ninth Circuit ruled in the *Greene* cases, *supra*, or Tulalip and other Tribes were denied due process when they were prevented from intervening in the administrative recognition proceedings.

5. Samish created its own problem by choosing to litigate its treaty status before obtaining federal recognition.

In 1975, a number of other tribes, like Samish, had neither federal recognition nor treaty tribe status. The Stillaguamish and Upper Skagit Tribes chose the same path as Samish, *i.e.* to litigate treaty tribe status before achieving federal recognition, and were found to have Treaty fishing rights. *Washington I*, 384 F. Supp. at 378-79. Others, such as the Jamestown S'Klallam, elected to wait to litigate treaty tribe status until ***after*** they had achieved federal recognition. *See United States v. State of Washington*, 626 F. Supp. 1405, 1433 (Findings of Fact 326 & 327) (W.D. Wash. 1985). Samish elected to proceed without first obtaining federal recognition, and fully litigated its treaty tribe status in court. In so doing, Samish forfeited its right to relitigate the treaty tribe status at a later date. Nothing is more basic to the well-settled rules protecting the finality of judgments than the rule that a litigant gets only one bite at the judicial "apple".

6. Samish has not, and cannot, support its claim that the Tribes made "promises" to Samish to induce Samish not to pursue its treaty rights.

Samish claims that in previous proceedings," . . . the United States, the United States District Court, and those tribes opposing Samish treaty status all suggested that future federal recognition would probably warrant reexamination of the Samish Tribe's treaty fishing rights", and characterizes these alleged "suggestions" as "promises". *Samish Brief in Opposition* at page 5. There are at least two problems with this argument.

First, Samish does not, and cannot, point to a single instance in which the Tribes opposing treaty status suggested that future federal recognition would warrant re-examination of Samish's treaty rights. To the contrary, the Petitioning Tribes

have consistently taken the position that federal recognition would ***not*** justify reopening the issue.

Second, no one made any ***promises*** to Samish. Samish claims that the "most explicit" of the so-called "promises" occurred when the United States included the following statement in its Opposition to Samish's original Petition for Certiorari in the 1979 case:

> "[S]hould [the Samish] succeed in obtaining 'acknowledgement' of their current status as an 'Indian tribe []' in the pending administrative proceedings, this ***might*** justify an application to re-open the present judgment against them.

Samish Brief in Opposition at p. 5, note 8 (emphasis added). As the Court can see, it is a misnomer to call this statement a "promise". Certainly it is not the kind of affirmative statement required for promissory estoppel:

> The first essential element of promissory estoppel is that the promisor has made a binding offer in the form of a promise. . . . This promise must be definite and certain so that the promisor should reasonably foresee that it will induce reliance by the promisee or a third party. . . . A mere expression of future intention, however, does not constitute a sufficiently definite promise to justify reasonable reliance thereon.

Santoni v. Federal Deposit Ins. Corp., 677 F.2d 174, 179 (1st Cir. 1982).

7. Samish's Brief in Opposition includes unsupported factual statements and citations to evidence not in the record.

Federal Rule of Appellate Procedure 10 prohibits Samish form offering new "evidence" to the Court except by motion. Nevertheless, Samish violates this rule twice. First, Samish cites a tribal council resolution in support of its argument. *See Samish Opposition Brief* at 2, n.5. But that document is not in the administrative record. Second, Samish claims that "[t]he Department of Interior and the Department of Justice took three years to deny the Samish Tribe's request for recognition"

with no citation to the record below. *See id.* These references and averments should be stricken.

8. The Decision below destroys needed finality and repose for adjudicated cases.

In *Tahoe Sierra Preservation Council, Inc. v. Tahoe*, 322 F.3d 1064, 1077 (9th Cir.2003), the Ninth Circuit eloquently explained why finality and repose are central to our jurisprudence. Holding that final judgments should "rest in peace", the Court underscored the "merits of finality."

> The doctrine of *res judicata* provides that 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.' The application of this doctrine is 'central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.' Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated 'conserves judicial resources' and 'fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'

Id.

The Ninth Circuit's ruling in the case at bar is at total odds with these views. Here, the lower court's decision wastes judicial resources, increases the likelihood of inconsistent decisions, rejects well-established law interpreting Rule 60(b), and subjects the Petitioning Tribes to the threat of having to engage in costly re-litigation of an issue that was resolved and sustained on appeal many years ago. The expansion of this ill-conceived decision to other situations and cases has already begun.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted on behalf of the Petitioning Tribes this 20th day of December, 2005.

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Counsel for Petitioner
The Tulalip Tribes

DANIEL A. RAAS
RAAS JOHNSEN & STUEN, P.S.
1503 E Street, P.O. Box 5746
Bellingham, WA 98227-5746
(360) 647-0234

Counsel for Petitioner
Lummi Nation

ALIX FOSTER
P.O. Box 817
LaConner, WA 98257
(360) 466-7220

Counsel for Petitioner
Swinomish Indian
Tribal Community

TIM WEAVER
TIM WEAVER LAW OFFICE
P.O. Box 487
Yakima, WA 98907
(509) 575-1500

Counsel for Petitioners
Confederated Tribes and Bands of the
Yakama Nation

HAROLD CHESNIN
35944 Community Plaza Way
Sedro Wooley, WA 98284
(360) 854-7000

Counsel for Petitioner
Upper Skagit Indian Tribe

LAUREN RASMUSSEN
GENDLER & MANN, LLP
1424 4th Ave, Suite 1015
Seattle, WA 98101
(206) 621-8868

Counsel for Petitioner
the Port Gamble and Jamestown
S'Klallam Indian Tribes